CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 67.

JAMES FOPPIANO, PLAINTIFF IN ERROR,

vs.

ROBERT A. SPEED, AS CLERK OF THE COUNTY COURT OF SHELBY COUNTY.

No. 68.

JAMES FOPPIANO, PLAINTIFF IN ERROR,

vs.

ROBERT A. SPEED, AS CLERK OF THE COUNTY COURT OF SHELBY COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED JULY 28, 1904.

(19,427 & 19,428.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 26, 1905.

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1 No. 44, Shelby Law Docket.

Circuit Court of Shelby County.

J. P. Young, judge circuit court.
L. E. Boswell, clerk.

JAMES FOPPIANO, Plaintiff in Error,
vs.
R. A. SPEED, Clerk of County Court of Shelby County, Tenn., Defendant in Error.

Attorneys: Randolph & Randolph, for plaintiff in error. C. D. M. Greer, for defendant in error.

Filed 18th day of March, 1904.

JNO. W. BUFORD,
Clerk Supreme Court,
By T. W. POPE,
Deputy Clerk.

2 STATE OF TENNESSEE:

Pleas, at a term of the circuit court of Shelby county, of Shelby county, State aforesaid, begun and held at the court house, the city of Memphis, on Monday the 18th day of January, 1904, the same being the third Monday in January, 1904, present and presiding, the Hon. J. P. Young, judge, etc., L. E. Boswell, clerk of said court, and Geo. W. Blackwell, sheriff of Shelby county, when the following proceedings were had to-wit:

Agreed Case.

Filed Feb. 15, 1904. Wm. Reisser, D. C.

In the Circuit Court of Shelby County, Tennessee.

JAMES FOPPIANO
vs.
ROB'T A. SPEED, Clerk of the County Court of Shelby County.
(Suit to Recover Tax and Costs Illegally Collected.)

Robert A. Speed, as clerk fof the county court of Shelby county, has demanded payment of the tax of plaintiff, James Foppiano, claiming that he is liable to pay the tax prescribed in that portion of section 4, of chapter 257, of the Acts of the General Assembly of the Year 1903, page 615, reading as follows:—

"Persons selling beer, or any quantity of liquors on steamboats, flat boats, or any other vessel or water craft, or from rail road cars, shall pay a tax each in lieu of all other taxes, to be paid in any county they may elect, per annum. Two hundred dollars."

The said Speed also claims that the said Foppiano is required to take out a license to carry on the said business, as a prerequisite to carrying on the same.

The said Foppiano has denied, and denies his liability to pay such tax, or that he is required to take out a license to carry
3 on the said occupation and business—because he has been, and is engaged in interstate commerce between the State of Arkansas and the State of Tennessee, and has made no sales of beer or liquors on steamboats, *falt* boats, or other vessels or water craft, or from railroad cars, except when engaged in such interstate commerce.

The said James Foppiano, in compliance with the demand of the said Speed, as clerk, and forbear- of the issuance of the said distress warrant, has this day paid the said Speed, as such clerk, one hundred dollars, as the tax on the privilege of carrying on the said business for six months from the 1st, day of January, 1904, and the cost charged. But he has made such payment unwillingly, and under protest, denying that he ought to be compelled to do so. The said Speed has executed to him a receipt for such money, and has also issued to him a license to carry on the said business on the steamboat, "Charles H. Organ," for six months from the 1st. day of January, 1904, and has stated in such receipt, and upon such license, that the sum of money has been paid under protest, and has charged him therefor $119.40 which he has paid.

Now, with the view of having the questions presented, judicially determined, it has been agreed, and is hereby agreed, between the parties, James Foppiano, the plaintiff, and Rob't A. Speed, as clerk of the county court of Shelby county, defendant, as follows:—

That the West Memphis Packet Company is, and has been for more than fifteen years last past, a corporation duly created and existing under and in accordance with the laws of the State of Arkansas, located and having its situs at West Memphis, in the county of Crittenden, in the State of Arkansas, situated just opposite the lower end of the city of Memphis, across the Mississippi river, having power by its charter, to buy or build, and own one or more
4 steam boats, barges and flat boats, and other water craft, to be used in transporting freight and passengers on the Mississippi river, and the lakes, bayous and other navigable streams connecting therewith, within the limits of the State of Arkansas—and during the time the plaintiff, James Foppiano, has been engaged selling beer and liquors, as herein stated, the West Memphis Packet Company has been in the exercise of its corporate powers and privileges, and engaged continuously in commerce between the city of Memphis, in the State of Tennessee, and points contiguous thereto, situated along the Arkansas shore of that river.

For more than fifteen years the West Memphis Packet Company has been operating a ferry across the Mississippi river, from Hopefield point, in Crittenden county, Arkansas, and other points adjacent thereto, in the State of Arkansas, to and from the State of Tennessee, under licenses to operate such ferry, regularly granted and issued to it—the West Memphis Packet Company—by the county court of Crittenden county, Arkansas, the tribunal authorized by the constitution and laws of the State of Arkansas to grant and issue such licenses. And under such licenses, the said West Memphis Packet Company has been making landings regularly, at its dock at the wharf in the city of Memphis, on the Mississippi river, and there receiving and discharging freight and passengers, transported, or to be transported by means of such ferry along and across the Mississippi river. It has made but one landing regularly, in the course of such business, in the State of Tennessee, and two or more in the State of Arkansas.

For more than three years past, the West Memphis Packet Company has used and employed the steamboat, "Charles H. Organ," as its regular ferry boat, in carrying on the ferry aforesaid, under its said licenses, and such steamboat has made stated regular trips during all that time between Memphis and the points aforesaid in the State of Arkansas, constituting such ferry landings, and is now, and proposes to be hereafter continuously engaged exclusively in such business.

The steamboat "Charles H. Organ" is owned by the West Memphis Packet Company, and is duly enrolled and licensed as a steam vessel to navigate the Mississippi river and its tributaries, and under the laws of the United States regulating the coasting trade, and for other purposes, in the custom house, at Memphis—Memphis being the nearest port of the United States to the residence of the West Memphis Packet Company, and the home port of the said steam boat.

Ever since the West Memphis Packet Company begun the keeping and maintaining of a ferry across the Mississippi river, as before stated, a bar has been, and is now, kept and maintained on the steamboat it used and operated for that purpose, by some individual to whom it rented the privilege of keeping such bar, and carrying on at the same the sale of beer and liquors, by retail, to persons transported, ro to be transported, or upon the said steam boat.

During the years 1901, 1902 and 1903, James Foppiano was the lessee of the West Memphis Packet Company, and rented such bar on the steam boat "Charles H. Organ," from it, and at such bar, during the said time, when the boat was in transit along or across the river, or when temporarily at the landings on the one side or the other of the river—he made sales by retail, of beer and liquors to persons transported, or being transported, or to be transported on such steam boat, or who were thereon and applied to make purchases—and for the said years he paid no tax on such business, and took out no license therefor.

The said James Foppiano is the lessee, under contract, of the West Memphis Packet Company, up to July 1st, of the year 1904, and has been carrying on, and proposes to carry on the said business at the bar of the said steamboat, and make sales of beer and liquors in the same way, as before stated, during such time.

6 To carry on such business, the defendant, Rob't A. Speed, as clerk of the county court, insists that the said James Foppiano requires a license, and must pay the tax prescribed by the law, referred to above; and the said Foppiano denies those facts, and insists that he is not required to take out the license, or pay the tax, under the law. He claims the $100 and costs have been illegally taken from him.

Upon the above facts, the court is to decide the controversy between the parties, and render the proper judgment—subject to the right of either party to take the case by appeal, in the nature of a writ of error, or a writ of error, to the supreme court, or other court having jurisdiction.

The costs shall abide the event of the suit.

Done the 15th day of February, 1904.

his
JAMES x FOPPIANO.
mark.
R. A. SPEED,
Clerk County Court.

Witness:
C. D. M. GREER.

STATE OF TENNESSEE,
County of Shelby.

We, James Foppiano, and Rob't A. Speed, as clerk of the county court of Shelby county—the parties named in the foregoing agreed case do state on oath that the controversy is real, and the proceeding in good faith, for the purpose of determining the rights of the parties, as above set out.

his
JAMES x FOPPIANO.
mark.
R. A. SPEED.

Witness-
by WM. REISSER.

7 Subscribed and sworn to, before me, Wm. Reisser, deputy clerk of the circuit court of Shelby county, this 15th day of February, 1904.

WM. REISSER,
Deputy Clerk.

We, the undersigned, acknowledge ourselves sureties for the above named parties, and bind ourselves to pay the costs which may accrue in the above case.

Done this 15th day of February, 1904.

WM. M. RANDOLPH.
C. D. M. GREER.

Bond approved by me.

WM. REISSER,
Deputy Clerk.

Final Judgment, Appeal Prayed & Granted.

In the Circuit Court of Shelby County, Tennessee.

JAMES FOPPIANO
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County. } #5030, R. D. Jan. Term, 1904.

MON., Feb. 29/04.

This cause was this day heard upon the agreed case on file—and the court having considered the same, and the facts agreed on, and heard the arguments of the counsel, finds: That the plaintiff is not entitled to recover of the defendant any sum on account of the tax paid, or the costs or charges paid, as shown in the agreed case.

8 It is, therefore, considered, ordered and adjudged, that the defendant go hence without day, and recover of the plaintiff all his costs in this behalf expended, for which execution will issue.

And thereupon, the plaintiff comes and prays an appeal, in the nature of a writ of error from the said judgment, and having executed an appeal bond conditioned according to law, with J. C. Wyckoff good and sufficient security, which is hereby approved, such appeal is granted to the supreme court of the State of Tennessee, on the first Monday, of April, 1904.

Appeal Bond.

Filed Feb. 29, 1904. L. P. Thompson, D. C.

Know all men by these presents, that we, James Foppiano principal and J. C. Wyckoff surety are held and firmly bound unto Rob't A. Speed, clerk of the county court, heirs, executors, administrators, and assigns, in the penal sum of two hundred and fifty dollars, for the payment of which, well and truly to be made and done, we bind ourselves, and each of us, our heirs, executors, administrators, and assigns, both jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 29th day of Fe-ruary A. D. 1904.

But the condition of the above obligation is such:

That, whereas, the above bounden James Foppiano has this day prayed and obtained an appeal, in the nature of a writ of error, to the next term of the supreme court, to be held for the western division of the State of Tennessee, at Jackson, on the first Monday in April next, from a judgment which the said Rob't A. Speed,
9 clerk of the county court obtained against him in the circuit court of Shelby county, at the January term, and the 29th day of Feb., 1904 for costs of suit. Now, if the said appellant prosecute his said appeal with effect, or in case he fails therein, do pay and satisfy, abide by and perform the judgment, order or decree of the said supreme court, to be *ahd* therein and all such costs as may be awarded against him for wrongfully prosecuting said appeal, or in any event shall pay all costs which may at any time be adjudged against him in the cause in said supreme court, then this obligation to be void, otherwise to remain in full force and effect.

JAMES FOPPIANO, [SEAL.]
By RANDOLPH & RANDOLPH, Att'ys.
J. C. WYCKOFF. [SEAL.]

STATE OF TENNESSEE:

I, L. E. Boswell, clerk of the circuit court of Shelby county hereby certify that the foregoing 9 pages of words and figures contain a full, true and complete transcript of all the records and proceedings had in the suit therein named, wherein James Foppiano is the plaintiff, and R. A. Speed, county court clerk the defendant, as the same appears of record, and on file in my office.

In testimony whereof, I hereto subscribe my name and affix the seal of said court, at my office, in the city of Memphis, Shelby county, this the 11th day of March, 1904.

[Seal Circuit Court, Shelby County, Tennessee.]

L. E. BOSWELL, Clerk,
By WM. REISSER,
Deputy Clerk.

10 No. 43, Shelby L. D.

Circuit Courts of Shelby County.

J. P. Young, judge circuit court.
L. E. Boswell, clerk.

JAMES FOPPIANO, Plaintiff in Error,
vs.
R. A. SPEED, Clerk of County Court of Shelby County, Tenn., Defendant in Error.

Attorneys: Randolph & Randolph for plaintiff in error. C. D. M. Greer, for defendant in error.

Filed 18th day of March, 1904.

JNO. W. BUFORD,
Clerk Supreme Court,
By T. W. POPE,
Deputy Clerk.

11 STATE OF TENNESSEE:

Pleas, at a term of the circuit court of Shelby county, begun and held at the court house, in the city of Memphis, State aforesaid, on Monday the 18th day of January, 1904, the same being the third Monday in January, 1904, present and presiding Hon. J. P. Young, judge, etc., also present L. E. Boswell, clerk of said court, and Geo. W. Blackwell, sheriff of Shelby county, when the following proceedings were had:—

Agreed Case.

Filed Feb. 19, 1904. L. E. Boswell, Clerk.

In the Circuit Court of Shelby County, Tennessee.

JAMES FOPPIANO, Plaintiff,
vs.
ROBERT A. SPEED, Clerk of the County Court of Shelby County, Defendant.

Suit to Recover Taxes and Cost Illegally Charged for Retail Liquor Licenses for the Years 1901, 1902, and 1903.

Robert A. Speed, as clerk of the county court of Shelby county, has undertaken to back-assess the plaintiff, James Foppiano, for having carried on the business of selling beer and liquors at a bar on the steamboat, "Charles H. Organ," plying in the Mississippi river, to and from the city of Memphis and adjacent points in the State of Arkansas, across the Mississippi river, for and during the

years 1901, 1902 and 1903, respectively, and has demanded of the said James Foppiano, that he pay two hundred dollars tax for each of the said years, and in addition thereto, take out a license to carry on the said business for each of the said years, and pay there-
12 for clerk's fees for issuing the license for each year, and for taking a liquor bond, and countersigning the license for each year, amounting to four dollars, and also pay the fees or costs charged by or for C. D. M. Greer, revenue agent, on the taxes for each of the said years, amounting each year to thirty dollars—making a total amount for each year of two hundred and thirty-four dollars, or an aggregate amount for the three years, of seven hundred and two dollars.

No demand has been made by the said Speed, as clerk of the county court, or by any clerk of the county court, for the said taxes, but on the 18th day of November, 1903, C. D. M. Greer, as revenue agent, by a postal card addressed to and received by the said James Foppiano, gave notice to the said Foppiano, that his State and county license for exercising the privilege of carrying on the business of retailing liquor on steamboats, was required to be taken out, and the tax therefor paid.

Thereupon the said James Foppiano was cited by the said Robert A. Speed, as clerk of the county court, at the request of C. D. M. Greer, revenue agent, to appear before him, the said Rob't A. Speed, as clerk, to be back-assessed for having carried on the said business for the said years, 1901, 1902, and 1903, respectively, without having taken out the licenses for doing so, and paying the tax levied thereon by law, for each year, and for ascertaining whether said Jas. Foppiano was liable for said tax.

The said James Foppiano appeared under the said notice, and resisted the said back-assessment for the said years respectively, to-wit: the years 1901, 1902 and 1903, on the ground—(1) that the law does not authorize any back assessment or re-assessment of taxes on taxable privileges, or for carrying on a business under a license, but applies only to the back assessment of taxable property.

(2.) That by the terms of each — the Acts of 1899 (see sec. 15, page 1051), the Acts of 1901 (see sec. 16, page 227), and the Acts of 1903 (see sec. 16, page 629–630), the laws creating
13 the privilege and levying the tax upon persons selling beer, or any quantity of liquors on steamboats, *fa*ltboats, or any other vessel, or water craft, and making it a misdemeanor to exercise such privilege, without paying the tax, any person, firm or corporation engaged in interstate commerce was exempted and excluded from the operation of such laws, and that he during all the said years 1901, 1902 and 1903, when carrying on the business of selling beer or liquors on steamboats, flatboats, or other water craft, was engaged exclusively in interstate commerce between the State of Arkansas and the State of Tennessee, to-wit: in selling beer and liquors on board the steamboat "Chas. H. Organ," then engaged exclusively in interstate commerce between the State of Tennessee

and the State of Arkansas, and made no such sales except upon such steamaboat, when so engaged in such commerce.

And (3) because under the Constitution of the United States, independently of the exemptions of the State statute, he was not subject to, and could not be charged a tax, or required to take out a license for having sold beer or liquors on the steamboat "Chas. H. Organ," while such steamboat was engaged in interstate commerce, and that he had made no sales except such as were made on the said steamboat while it was engaged in such interstate commerce.

The said Robert A. Speed, as clerk of the county court, upon the hearing of the said matters, over-ruled the defences of the said James Foppiano, and found and adjudged that he should be back assessed for, and pay for a State privilege license and tax for selling beer and other intoxicants, from a bar upon the steamboat "Chas. H. Organ," having its home port at Memphis, and plying the waters of the Mississippi river between Memphis and points in Arkansas—that is to say, that for the year 1901, he should pay a tax of two hundred dollars and clerk's fees four dollars, and revenue agent's fees thirty dollars; that for the year 1902 he should pay a tax of two hundred dollars, clerk's fees four dollars, and revenue agent's fees
14 thirty dollars; *and revenue agent's fees thirty dollars;* and that for the year 1903, he should pay a tax of two hundred dollars, clerk's fees four dollars, and revenue agent's fees thirty dollars, making in all the sum of seven hundred and two dollars, and that a distress warrant would issue therefor.

The said James Foppiano appealed from the decision of the said Rob't A. Speed as clerk, to the State board of equalization, and such board, on the 10th day of Feb., 1904, heard such appeal, and affirmed the finding and order of the said Rob't A. Speed as clerk.

Thereupon, on the 15th day of Feb., 1904, the said James Foppiano, in compliance with the demand of the said Rob't A. Speed as clerk of the county court, and in obedience to the said decisions by him and the State board of equalization, and for fear of a distress warrant against him, paid the said Speed as such clerk of the county court, the said sums—that is to say, for taxes, costs and charges for the year 1901, $234.00; for taxes, costs and charges for the year 1902, $234.00; for taxes, costs and charges for the year 1903, $234.00, making altogether the sum of $702.00. But he has paid each and all the said sums unwillingly, and under protest, denying that he ought to be compelled to do so. The said Speed has executed to him receipts for such sums of money, so paid, for each of the said years, and has also issued to him licenses purporting to authorize him to carry on the said business on the steamboat "Chas. H. Organ," for the said years respectively, 1901, 1902, and 1903, and has stated in such receipts and licenses, that the said sums of money have been paid by the said Foppiano under protest.

Now, with the view of having the questions presented judicially determined, it has been agreed, and is hereby agreed between the

parties, James Foppiano, the plaintiff, and Rob't A. Speed, as clerk of the county court of Shelby county, defendant, as follows:—

15 That the West Memphis Packet Company is, and has been for more than fifteen years last past, a corporation duly created and existing under and in accordance with the laws of the State of Arkansas, located and having its situs at West Memphis, in the county of Crittenden, in the State of Arkansas, situated just opposite the lower end of the city of Memphis, across the Mississippi river, having power by its charter to buy or build and own one or more steamboats, barges and *falt*boats, and other water craft, to be used in transporting freight and passengers on the Mississippi river, and the lakes, bayous and other navigable streams connecting therewith, within the limits of the State of Arkansas; and during the time the said James Foppiano was engaged in selling beer and liquors, as herein stated, the said West Memphis Packet Company was in the exercise of its corporate powers and privileges, and engaged continuously in commerce between the city of Memphis, in the State of Tennessee, and points contiguous thereto, situated along the Arkansas shore of the Mississippi river.

For more than fifteen years the West Memphis Packet Company has been operating a ferry across the Mississippi river from Hopefield point, in Crittenden county, Arkansas, and other points adjacent thereto in the State of Arkansas, to and from the State of Tennessee, under licenses to operate such ferry, regularly granted and issued to it, the West Memphis Packet Company, by the county court of Crittenden county, Arkansas, the tribunal authorized by the constitution and laws of the State of Arkansas to grant and issue such licenses—and under such licenses the West Memphis Packet Company had been making landings regularly, at its dock, at the wharf in the city of Memphis, on the Mississippi river, and there receiving and discharging freight and passengers transported or to be transported by means of such ferry along and across the Mississippi river. It had made but one landing regularly in

16 the course of such business in the State of Tennessee, and two or more in the State of Arkansas.

For more than four years last past, the West Memphis Packet Company has used and employed the steamboat, "Chas. H. Organ" as its regular ferry boat, in carrying on the ferry aforesaid, under its said licenses, and such steamboat had made stated regular trips during all that time, between Memphis and the points aforesaid, in the State of Arkansas, constituting such ferry landings.

The steamboat "Chas. H. Organ" was owned by the West Memphis Packet Company, and was duly enrolled and licensed as a steam vessel, to navigate the Mississippi river and its tributaries, under the laws of the United States regulating the coasting trade, and for other purposes, in the custom house at Memphis—Memphis being the nearest port of the United States to the residence of the West Memphis Packet Company, and the home port of the said

steamboat for each of the said years 1901, 1902 and 1903, and before that time.

Ever since the West Memphis Packet Company begun the keeping and maintaining of a ferry across the Mississippi river, as before stated, a bar has been, and was during the years 1901, 1902, and 1903, kept and maintained on the steamboat it used and operated for that purpose, by some individual to whom it rented the privilege of keeping such bar, and carrying on at the same the sale of beer and liquors, by retail, to persons transported, or to be transported, or upon the said steamboat.

During the years 1901, 1902 and 1903, James Foppiano was the lessee of the West Memphis Packet Company, and rented such bar on the steamboat "Chas. H. Organ" from it, and at such bar, during the said time, when the boat was in transit along or across the river, or when temporarily at the landings on the one side or the other of the river, he made sales by retail, of beer and liquors to persons transported, or being transported, or to be transported upon
17 such steamboat, or who were thereon and applied to make purchases. And for the said years 1901, 1902 and 1903, he paid no taxes on such business, and took out no licenses therefor.

For carrying on the said business for the said years 1901, 1902, and 1903, respectively, in the manner aforesaid, the defendant Rob't A. Speed, as clerk of the county court, insists that the said James Foppiano was required to, and should have taken out a license for each year, and also was required to, and should have paid the tax for each year, prescribed by the law levying such taxes, and the costs and charges therefor collected by him as before stated, and not having done so, that he was authorized and required by law to make such collections, and is not liable to repay the same.

The said James Foppiano denies that under the facts, he was required by law to take out any licenses, or pay any taxes, for carrying on the said business for the said years 1901, 1902 and 1903, respectively or either of them, in the manner aforesaid. He denies that the said Rob't A. Speed was authorized or required by law to collect either the taxes collected by him in the manner aforesaid, or the costs or charges aforesaid, or any part thereof, and claims that all such sums have been illegally exacted of and collected from him and against his will, and that he is entitled to recover them back.

Upon the above facts the court is to decide the controversy between the parties, and render the proper judgment for the plaintiff, or the defendant, subject, however, to the right of either party to take the case by appeal, in the nature of a writ of error, or by writ of error to the supreme court, or any other court having jurisdiction in the premises.

The costs of this suit shall abide the event of the suit.
Done this 19th day of February, 1904.

his
JAMES x FOPPIANO.
mark.
R. A. SPEED, Clerk.

Witness:
WM. M. RANDOLPH.

18 STATE OF TENNESSEE, }
County of Shelby. }

We, Wm. M. Randolph, representing the plaintiff, James Foppiano, and C. D. M. Greer, representing the defendant, Rob't A. Speed, as clerk of the county court of Shelby county, the parties named in the foregoing agreed case, do state on oath that the controversy is real, and the proceedings in good faith, for the purpose of determining the rights of the parties, as above set out.

WM. M. RANDOLPH.
C. D. M. GREER.

Subscribed and sworn to before me, L. E. Boswell, clerk of the circuit court of Shelby county, this 19th day of February, 1904.

L. E. BOSWELL, Clerk.

We, the undersigned, acknowledge ourselves sureties for the above named parties, and bind ourselves to pay the costs which may accrue in the above case.
Done this 19th day of February, 1904.

WM. M. RANDOLPH.
C. D. M. GREER.

Bond proven by me:
L. E. BOSWELL, Clerk.

Final Judgment, Appeal Prayed and Perfected.

JAMES FOPPIANO
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County. } # 5035, R. D., January Term, 1904.

MONDAY, February 29th, 1904.

19 This cause was this day heard upon the agreed case on file—and the court having considered of the same, and the facts agreed on, and heard the arguments of the counsel, finds: That the plaintiff is not entitled to recover of the defendant any sum on account of the tax paid, or the costs or charges paid, as shown in the agreed case.

It is, therefore ordered, and adjudged, that the defendant go hence without day, and recover of the plaintiff all his costs in this behalf expended, for which execution will issue.

And thereupon, the plaintiff comes and prays an appeal, in the nature of a writ of error from the said judgment, and having executed an appeal bond conditioned according to law, with J. C. Wyckoff good and sufficient security, which is hereby approved, such appeal is hereby granted to the supreme court of the State of Tennessee to sit at Jackson, on the first Monday of April, 1904.

Appeal Bond.

Filed Feb. 29, 1904. L. P. Thompson, D. C.

Know all men by these presents, that we, James Foppiano principal and J. C. Wyckoff surety, are held and firmly bound unto Rob't A. Speed, clerk of the county court, heirs, executors, administrators, and assigns, in the penal sum of two hundred and fifty dollars, for the payment of which, well and truly to be made and done, we bind ourselves, and each of us, our heirs, executors, administrators, and assigns, both jointly and severally, firmly by these presents. Sealed with our seals, and dated this 29th. day of February, A. D., 1904.

But the condition of the above obligation is such: that whereas, the above bounden James Foppiano, has this day prayed and
20 obtained an appeal, in the nature of a writ of error, to the next term of the supreme court, to be held for the western division of the State of Tennessee, at Jackson, on the first Monday in April next, from a judgment which the said Rob't A. Speed clerk of the county court obtained against him in the circuit court of Shelby county, at the January term, and the 29th, day of February, 1904 for costs of suit.

Now, if the said appellant prosecute his said appeal with effect or in case he fail therein, do pay and satisfy, abide by and perform the judgment, order or decree of the said supreme court, to be had therein and all such costs as may be awarded against him for wrongfully prosecuting said appeal, or in any event shall pay all costs which may at any time be adjudged against him in the cause in said supreme court, then this obligation to be void, otherwise to remain in full force and effect.

JAMES FOPPIANO, [SEAL.]
By RANDOLPH & RANDOLPH, Att'ys.
J. C. WYCKOFF. [SEAL.]

STATE OF TENNESSEE:

I, L. E. Boswell, clerk of the circuit court of Shelby county, hereby certify that the foregoing 13 pages of words and figures contain a full, true and complete transcript of all the records and proceedings had in the suit therein named, wherein James Foppiano is the plain-

tiff, and R. A. Speed, cl'k of county court the defendant, as the same appears of record, and on file in my office.

In testimony whereof, I hereto subscribe my name and affix the seal of said court, at my office in the city of Memphis, Shelby county, this the 10th day of March, 1904.

[Seal Circuit Court, Shelby County, Tennessee.]

L. E. BOSWELL, Clerk,
By WM. REISSER,
Deputy Clerk.

21 In the Supreme Court of Tennessee.

JAMES FOPPIANO, Plaintiff and Appellant,
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County, Defendant and Appellee,
} Shelby Law Docket, No. 43.

and

JAMES FOPPIANO, Plaintiff and Appellant,
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County, Defendant and Appellee,
} Shelby Law Docket, No. 44.

and

LESLIE A. HARRELL, Plaintiff and Appellant,
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County, Defendant and Appellee.
} Shelby Law Docket, No. 48.

RANDOLPH & RANDOLPH,
Attorneys for James Foppiano and Les-ie L. Harrell.

Filed April 4, 1904.

JNO. W. BUFORD, Cl'k,
By T. W. POPE, D. C.

22 In the Supreme Court of Tennessee.

JAMES FOPPIANO, Plaintiff and Appellant,
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County, Defendant and Appellee,
} Shelby Law Docket, No. 43.

and

JAMES FOPPIANO, Plaintiff and Appellant,
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County, Defendant and Appellee,
} Shelby Law Docket, No. 44.

and

LESLIE L. HARRELL, Plaintiff and Appellant,
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County, Defendant and Appellee.
} Shelby Law Docket, No. 48.

23 The three cases mention- above stand upon agreed statements of fact. Substantially, they involve the same general questions. It has been agreed between the attorneys representing the parties, respectively, that the cases shall be tried together, and that one statement and assignment of errors and brief shall be filed in each case.

Shelby Law Docket, No. 43.

In this case, Rob't A. Speed, as clerk of the county court, undertook to back assess James Foppiano for having carried on the business of selling beer and liquors at a bar on the steamboat "Chas. H. Organ," plying the Mississippi river, to and from the city of Memphis, and adjacent points in the State of Arkansas, across the Mississippi river, for each — the years 1901, 1902 and 1903, respectively, and demanded of him that he pay $200 tax for each of the years, and in addition thereto, take out a license to carry on the said business for each of the said years, and pay him fees for issuing the license for each year, and for taking a liquor bond and countersigning the license for each year $4, and also pay the fees or costs charged by or for C. D. M. Greer, as revenue agent, on the taxes for each of the said years, amounting each year to $30, and making a total amount for each year of $234, or an aggregate amount for the three years of $702.

No demand had been made of Foppiano by the clerk of the county court, or any one, for such taxes until the 18th day of November,

1903, when the revenue agent, by a postal card addressed to Foppiano and received by him, gave him notice that his State and county license for exercising the privilege of carrying on the business of retailing liquors on the steamboat was required to be taken out and the tax therefor paid.

Foppiano was then cited by the clerk of the county court, at the request of the revenue agent, to appear before the clerk to be back assessed for having carried on the said business for the said
24 years 1901, 1902 and 1903, without having taken out the license and paid the tax levied thereon for each year.

Foppiano appeared under the notice and resisted the back assessment for each of the years, on the ground (1) that the law did not authorize any back assessment or re-assessment of taxes on taxable privileges or for carrying on a business under a license, but applied only to the back assessment of taxable property.

(2.) That by the terms of each of the Acts, 1889, chap. 232, sec. 15, page 1051, the Acts of 1901, chap. 128, sec. 16, page 227, and the Acts of 1903, chap. 257, sec. 16, pages 629–630, the laws creating the privileges and levying the tax upon persons selling beer or any quantity of liquors on steamboats, flat boats, or any other vessel or water craft, and making it a misdemeanor to exercise such privilege without paying the tax; any person, firm or corporation engaged in interstate commerce, was exempted and excluded from the operation of such law; and that he (Foppiano), during all the said years, when carrying on the business of selling beer or liquors on a steamboat, flat boat, or other vessel or water craft, was engaged exclusively in interstate commerce between the State of Arkansas and the State of Tennessee, to-wit: in selling beer and liquors on board the steamboat "Chas. H. Organ," then engaged exclusively in interstate commerce between the State of Tennessee and the State of Arkansas, and made no such sales except upon such steamboat, when so engaged in such commerce.

(3.) Because, under the Constitution of the United States, independently of the exemptions of the State statute, he was not subject to and could not be charged a tax or required to take out a license for having sold beer or liquors on the steamboat "Chas. H. Organ" while that steamboat was engaged in interstate commerce, and that he had made no sales except such as were made on the said steamboat while it was engaged in such interstate commerce.

25 The clerk of the county court, upon the hearing, overruled Foppiano's defenses and adjudged that he should be back assessed and pay for a State privilege license and tax for selling beer and other intoxicants from the bar upon the steamboat "Chas. H. Organ," having its home port at Memphis and plying the waters of the Mississippi river between Memphis and points in Arkansas—that is to say, for the year 1901 he should pay a tax of $200, and clerk's fees, $4.00, and revenue agent's fees, $30, and for the succeeding years 1902 and 1903, respectively, the same sums on the same accounts, and that a distress warrant issue for the said sums.

Foppiano appealed from the decision of the clerk of the county court to the State board of equalization, and on the 10th day of February, 1904, the judgment of the clerk of the county court was affirmed by that board.

On the 15th of February, 1904, Foppiano, in compliance with the demand of the clerk of the county court, and in obedience to the decision of the State board of equalization, and for fear of a distress warrant, paid the clerk of the county court the said sums—that is to say, for taxes, costs and charges, for each of the years 1901, 1902 and 1903, respectively, $234, or in the aggregate, $702—but he made the payments unwillingly and under protest, denying that he ought to be compelled to do so.

The clerk of the county court executed to him receipts for the sums paid for each of the years, and issued him the licenses purporting to authorize him to carry on the said business on the steamboat "Chas. H. Organ" for each of the said years, respectively, and stated in the receipts and licenses that the said sums of money had been paid by Foppiano under protest.

With the view of having the questions presented determined judicially, this agreed case was made and filed in the circuit court on the 19th of February, 1904, and the following facts in substance were agreed to:

26 That the West Memphis Packet Company is and has been for more than fifteen years, a corporation duly existing under the laws of the State of Arkansas, having its situs at West Memphis, Crittenden county, Arkansas, situated just opposite the city of Memphis, across the Mississippi river, having power by its charter to build and own one or more steamboats, flat boats, barges and other water craft, to be used in transporting freight and passengers on the Mississippi river, and the lakes, bayous and other navigable streams connecting therewith, within the limits of the State of Arkansas, and that during the time James Foppiano was engaged in selling beer and liquors, as agreed, the said West Memphis Packet Company was in the exercise of its corporate powers and privileges, and engaged continuously in commerce between the city of Memphis, in the State of Tennessee, and points contiguous thereto, situated along the Arkansas shore on the Mississippi river.

For more than fifteen years the West Memphis Packet Company has been operating a ferry across the Mississippi river from Hopefield point, in Crittenden county, Arkansas, and other points in Arkansas adjacent thereto, to and from the State of Tennessee, under licenses to operate such ferry regularly, granted and issued to it (the West Memphis Packet Company), by the county court of Crittenden county, Arkansas—the tribunal authorized by the constitution and laws of the State of Arkansas to grant and issue such licenses, and under such licenses the West Memphis Packet Company had been making landings regularly at its dock at the wharf in the city of Memphis, on the Mississippi river, and there receiving and discharging freight and passengers transported or to be trans-

ported by means of such ferry along and across the Mississippi river. It has made but one landing regularly in the course of such business in the State of Tennessee, and two or more in the State of Arkansas.

27 For more than four years last past the West Memphis Packet Company had used and employed the steamboat "Chas. H. Organ" as its regular ferry boat, in carrying on the ferry aforesaid, under its said licenses, and such steamboat had made stated regular trips during all that time between Memphis and the points aforesaid in the State of Arkansas, constituting such ferry landings.

The steamboat "Chas. H. Orga-" was owned by the West Memphis Packet Company, and was duly enrolled and licensed as a steam vessel to navigate the Mississippi river and its tributaries, under the laws of the United States regulating the coasting trade, and for other purposes, in the custom house at Memphis—Memphis being the nearest port of the United States to the residence of the West Memphis Packet Company and the home port of the said steamboat, for each of the said years 1901, 1902 and 1903, and before that time.

Ever since the West Memphis Packet Company begun the keeping and maintaining of a ferry across the Mississippi river, as before stated, a bar had been and was during the years 1901, 1902 and 1903, kept and maintained on the steamboat it used and operated for that purpose, by some individual to whom it rented the privilege of keeping such bar and carrying on at the same the sale of beer and liquors, by retail, to persons transported, or to be transported, or upon the said steamboat. During the years 1901, 1902 and 1903, James Foppiano was the lessee of the West Memphis Packet Company, and rented such bar on the steamboat "Chas. H. Organ" from it, and at such bar, during the said years, when the boat was in transit, along or across the river, or when temporarily at the landings, on the one side or the other of the river, he made sales by retail of beer and liquors, to persons transported, or being transported or to be transported upon such steamboat, or who were thereon and applied to make purchases. And for the said years 1901, 1902 and 1903, he paid no taxes on such business, and took out no license therefor.

28 For carrying on the said business for the said years 1901, 1902 and 1903, respectively, in the manner aforesaid, Rob't A. Speed, as clerk of the county court, insisted that Foppiano was required to, and should have, taken out a license for each year, and was also required to, and should have, paid the tax for each year, prescribed by the law levying such taxes, and the costs and charges therefor, collected by him, as before stated, and not having done so, that he was authorized and required by law to make such collections, ans was not liable to repay the same.

Foppiano denied that upon the facts he was required by law to take out any licenses or pay any taxes for carrying on the said busi-

ness for the said years 1901, 1902 and 1903, respectively, or either of them, and denied that Speed, as clerk of the county court, was authorized or required by law to collect either the taxes collected by him in the manner aforesaid, or the costs, or charges aforesaid, or any part thereof, and claimed that all such sums had been illegally exacted of and collected from him, and against his will, and that he was entitled to recover them back.

Upon the foregoing facts agreed upon, the case was submitted to the circuit court of Shelby county for decision, each party reserving the right to take the case by appeal in the nature of a writ of error, or by writ of error to this court or any other court having jurisdiction in the premises, the costs to abide the event of the suit.

On the hearing on the 29th day of February, 1904, the circuit court found that Foppiano was not entitled to recover of Speed, as clerk of the county court, any sum, and gave judgment against him, for the costs of the suit. Foppiano has brought the case here by appeal in error.

Shelby Law Docket, No. 44.

29 The facts in this case have been agreed upon, as in the case No. 43, just stated. They are substantially the same as the facts agrred to in that case, except instead of covering the past time, they cover the time to come, from the 1st of January, 1904.

Rob't A. Speed, as clerk of the county court, demanded of Foppiano that he take out a license for the ensuing six months, to carry on the said business, in the same manner as it had been carried on for the years 1901, 1902 and 1903, as stated in the case No. 43, and pay the tax therefor. He demanded that Foppiano pay $100 for the tax, and $4.40 for his fees as clerk of the county court, also $15 as the fees of the revenue agent, making altogether the sum of $119.40.

Foppiano objected to making the payment, and finally paid the said sum under protest, and Speed, as clerk of the county court, executed him the proper receipt therefor, and issued him a license authorizing him to carry on the business, as he had been carrying it on, on the steamboat "Chas. H. Organ," for the six months beginning on the 1st of January, 1904, and ending on the 1st of July, 1904.

This agreed case has been entered into with a view of settling the question as to whether or not Foppiano was chargeable with the tax, and the costs and charges, and the same have been properly collected, or he has the right to recover them back as wrongfully demanded and paid.

The circuit court gave a judgment against Foppiano, and for the costs of the suit. He has brought the case here, by appeal, in the nature of a writ of error.

Shelby Law Docket, No. 48.

Leslie Harrell's Case.

This case is substantially the same as the other two upon its facts. The difference is, that the steamboat on which the bar is being kept is known as the "C. H. Hugo," and it belongs to the West
30 Memphis Ferry Company.

The "C. H. Hugo" is a steamboat duly licensed and enrolled, under the acts of Congress, and authorized to navigate the Mississippi river and its tributaries, and Memphis is its home port. It is owned by the West Memphis Ferry Company, a corporation of the State of Arkansas, also located at West Memphis, Crittenden county. It has similar powers to those possessed by the West Memphis Packet Company, as stated in the other cases. It has been, and is, engaged in commerce upon the Mississippi river, between the State of Arkansas and the State of Tennessee, and has been operating a ferry between Arkansas and Tennessee, under licenses granted it by the county court of Crittenden county, Arkansas, landing at one or two places in Tennessee and one in the State of Arkansas. Harrell has been, and is, keeping a bar on the steamboat "C. H. Hugo," selling beer and liquors, just as Foppiano had been and is keeping a bar and selling beer and liquors on the steamboat "C .H. Organ."

Speed, as clerk of the county court, demanded that Harrell take out a license to keep such bar, and carry on the business from the 1st of January, 1904, for the ensuing six months, and that he pay $100 tax, $4 as fees due the clerk of the county court, and the further sum of $22.25, additional costs and fees due the State revenue agent.

Harrell did not make the payment promptly and a distress warrant was issued against him, and then, under protest, he paid the sums demanded—that is, $100 for tax, $4 clerk's fees, and the further sum of $22.25, additional costs and the revenue agent's fees, all aggregating the sum of $126.25.

Speed, as clerk of the county court, executed him a proper receipt for the sums paid, and showed they were paid under protest, and then issued him a license to carry on the business and keep the bar on the steamboat "C. H. Hugo" for six months from the 1st of January, 1904, to the 1st of July, 1904.

31 This agreed case was entered into and filed to test the right of Speed, as clerk of the county court, to make the collections, and the right of Harrell to recover back the sums paid, as wrongfully demanded and paid.

Upon the agreed case the circuit court decided against Harrell, and adjudged that he pay the costs of the suit. From that judgment he has appealed in error to this court.

Assignment of Errors and Brief for Foppiano in Cases No. 43 and 44 and for Harrell in Case No. 48, Shelby Law Docket.

The errors assigned in each of the cases are substantially the same:

(1.) That by the constitution and laws of the State of Tennessee, neither Foppiano nor Harrell were liable to pay any of the sums demanded for taxes, costs or charges.

(2.) That each the steamboat "Chas. H. Organ" and the steamboat "C. H. Hugo," and Foppiano and Harrell, respectively, when keeping the bars and selling beer and liquors from those bars in the course of the voyages of the steamboats, respectively, along or upon the Mississippi river, and when landed on one side or the other, in the course of such voyages, were outside of the jurisdiction of the State of Tennessee, and not subject to be licensed or taxed by the State for the business carried on by them, respectively.

32 (3.) That the attempts to license and tax Foppiano and Harrell, respectively, for keeping the bars and selling beer and liquors from them, respectively, on the steamboats, "Chas. H. Organ" and "C. H. Hugo," respectively, were and are unauthorized and unlawful, because they are attempts to interfere with and regulate commerce between the State of Arkansas and the State of Tennessee and in conflict with the Constitution of the United States, and the statutes undertaking to do so are void.

The statute relied on as authority for the collection of the tax is: chapter 257 of the Acts of 1903, which is identical, so far as the questions in the present case are concerned, with chapter 128 of the Acts of 1901, and chapter 232 of the Acts of 1899. Each of the acts creates taxable privileges and fixes the taxes to be charged for the exercise of them, and requires licenses to be taken out therefor.

The Act of 1903, sec. 16, page 629-630 provides: "Persons selling beer or any quantity of liquors on steamboats, flatboats, or any other vessel or water craft, or from railroad cars, shall pay a tax each in lieu of all other taxes to be paid in any county they may elect, per annum, two hundred dollars."

And see: Acts of 1901, sec. 16, page 27; Acts of 1899, sec. 15, page 1051.

A subsequent provision of each statute is, that it shall be a misdemeanor to exercise any of the privileges without first paying the tax prescribed for the exercise of it, and that all parties offending are liable to a fine for each day such privilege is exercised without license. "But this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce.

Acts of 1903, chap. 257, pp. 629–630.

As to Foppiano's first case, No. 43, Shelby law docket, we submit

that the back assessment act, chapter 258, sec. 31, pp. 60–61
33 of the Acts of 1903, does not authorize the clerk of the county court to back-assess a privilege tax, but only a tax on property, and that he has no authority to do any such thing.

The brief and argument will discuss particularly the cases of Foppiano, but are intended to embrace also the case of Harrell.

(1.)

Our first position is, that by the very terms of the legislation of the State, Foppiano cannot be required to take out a license or pay the tax therefor, because he is manifestly engaged in commerce between the State of Arkansas and the State of Tennessee, and has not made any sale of beer or liquors, and does not propose to make any except in the course of such interstate commerce.

The steamboat "Chas. H. Organ" belongs to the State of Arkansas, where its home is, and when in Tennessee, or on the Tennessee side of the Mississippi river, is simply there in the carrying of interstate commerce. It can not be successfully claimed that when the steamboat is temporarily at the wharf or at the landing, on the Tennessee side, or remains at the wharf or the landing temporarily, for the purposes of the commerce it carries on, or of the ferriage, it is not then engaged in such commerce or ferriage. It is just as much engaged in commerce and ferriage when lying at the wharf or landing, on either side of the river, receiving or discharging freight or passengers, or waiting for the purpose of receiving or discharging them, as it is when in actual transit along or across the river, passing to or from one State to the other. No boat or vessel can, in the nature of things, be constantly moving in or passing along the river, but must necessarily stop and stay for longer or shorter periods at points or places, in order effectually to do the carrying it undertakes to do, and accommodate the public.

In this connection, attention is called to the constitution of Tennessee, sec. 29 of art. 1, declaration of rights, which pro-
34 vides: "That an equal participation in the free navigation of the Mississippi is one of the inherent rights of the citizens of this State. It cannot, therefore, be conceded to any prince, potentate, power, person or persons whatever." The free navigation is a fact, and participation in it is an inherent right.

This provision was not only in the constitution of 1834, but was also in the constitution of 1796, the only change being that in the present constitution the word "in" is substituted for the word "of," preceding the words "the free navigation." This change of phraseology, however, has not changed the sense or meaning of the provision.

When the cons-itution of 1796 was adopted and became the supreme law, Spain was the sovereign of the territory now constituting the State of Arkansas. It afterwards passed to France, and by the treaty between the French Republic and the United States of the year 1803, passed to the United States. But these changes of terri-

torial jurisdiction have not made any change in the organic law which we have quoted.

Now, it can scarcely be claimed that Tennessee would concede that Arkansas, or any prince, potentate, power, or person whatsoever, could require a license or levy a tax on its citizens for navigating or carrying on commerce on the Mississippi river. If it would not submit to such a claim, it can scarcely be permitted to it to claim that it can levy such a tax on citizens or residents of Arkansas, who now occupy the precise position which were occupied by the people of Spain, or the people of France, and afterwards by the people of the territory of the United States, when the United States became the owner of the west side of the Mississippi river, under the treaty of 1803, and before Arkansas became a State.

Undoubtedly the people of Arkansas have the same right to the free navigation of the river that the people of Tennessee have, and it is not to be supposed that Tennessee would deny equal
35 participation in the free navigation of the river, along with its own citizens, to the people of Arkansas.

While only the term "navigation" is used in the Constitution, it undoubtedly was meant by the framers that commerce upon and along the river should be included, and should be free, as well as the mere moving or passage of boats and vessels or other water craft. In a maritime country, navigation and commerce cannot well be separated, or rather the one is necessarily embraced in the other. And the same must be true of a country upon a great river like the Mississippi. If the people of the State could not freely trade or have free commercial intercourse with the people outside, along the river, the freedom of passing across or along the river would be of little practical benefit.

The ordinance of 1787 for the government of the northwest territory, which then was bounded by the Mississippi river as far south as Cairo, Illinois, enacted: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefor." Gould on Waters, sec. 68. In 1789, North Carolina made the cession of the country now constituting Tennessee, to the United States, and Congress by the act of April 2nd, 1790, signified its acceptance. See the act of North Carolina, and the act of Congress, in 2 Haywood & Cobb's Statute Laws of Tennessee. (Knoxville 1831), p. 7–11. Nicholson & Caruthers' Statutes p. 39–43.

The fourth condition of the cession was: "that the territory so ceded shall be laid out and formed into a State or States, containing a suitable extent of territory, the inhabitants of which shall enjoy all the privileges, benefits and advantages set forth in
36 the ordinance of the late Congress for the government of the western territory of the United States; that is to say—when-

ever the Congress of the United States shall cause to be officially transmitted to the executive authority of this State, an authenticated copy of the act to be passed by the Congress of the United States, accepting the cession of territory made by virtue of this act, under the express conditions hereby specified, the said Congress shall at the same time assume the government of the said ceded territory, which they shall execute in a manner similar to that which they support in the territory west of the Ohio; shall protect the inhabitants against enemies, and shall never bar or deprive them, or any of them of privileges which the people in the territory west of the Ohio enjoy."

At that time Spain controlled the country west of the river, and the river itself south of the south line of the present State of Mississippi.

In his opinion in County of Mobile *vs.* Kimball, 102 U. S. 691, Justice Field said:

"Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." Page 702.

And see: Gibbons *vs.* Ogden, 9 Wheaton, 1, and what Chief Justice Marshall said in his opinion, p. 189. etc.

The right of the owner of the land on one side of a public navigable river, forming the boundary between two States, having the license of the State in which such land is located, to operate a publi-ferry from that side, to maintain such ferry across the *the* river, and to land and receive passengers and freight on the other side, in the adjoining State, has long been established and is everywhere recognized.

Memphis *vs.* Overton, 3 Yerger 387.

37 Conway *vs.* Taylor, 1 Black, 603.

Shannon's Code, secs. 1697–1698.

Sandels & Hills' Digest of the Statutes of Arkansas, secs. 3372, 3375–3379 and 3382.

Gould on Waters, sec. 133; and cases cited.

In this view we claim that the General Assembly, by excluding persons who are engaged in interstate commerce from being guilty of an offense in not taking out the license and paying the tax required of others by the statute, now in question, must be understood as giving effect, in substance, to the provisions of the Constitution, and as declaring that Foppiano, being so engaged, is not subject to be licensed or taxed.

The Mississippi is probably the only river—certainly the only important river—on which interstate commerce is carried on to any large extent, forming the boundary of Tennessee, and the act of the General Assembly excepting persons engaged in interstate com-

merce from the penalty of not taking out the license, and not paying the privilege tax exacted of other- by the statute referred to, may well be understood to have special reference to persons engaged in such commerce on the Mississippi river.

See:

Railroad *vs.* Williams, 101 Tennessee, 146.
Escanaba Co. *vs.* Chicago, 107 U. S. 688. &c.
Cardwell *vs.* Am. Br. Co. 113 U. S. 205.
Huse *vs.* Glover, 119 U. S. 543.
Sands *vs.* Manistee River Imp. Co. 123 U. S. 259 &c.

(2.)

Our next position is, that Foppiano, engaged as a barkeeper in selling beer and liquors at the bar, on the steamboat "Chas. H. Organ," employed in interstate commerce, is not in the jurisdiction of the State of Tennessee for the purposes of a license or taxation.

38 The vessels and boats licensed and enrolled under the acts of Congress regulating the coa-ting trade, may very well be said to be the creatures of Congress, and for national purposes, to be subject immediately to the jurisdiction of the United States.

White's Bank *vs.* Smith, 7 Wallace, 646, 655, etc.
The Lottawana, 21 Wallace, 558, 577, etc.
Sherlock *vs.* Alling, 93 U. S., 96, 103, etc.
Providence & New York S. S. Co. *vs.* Hill Mfg. Co., 109 U. S., 578.

At the same time, the vessels and boats licensed and enrolled, and engaged in navigation or commerce upon the public na-igable waters, belongs to the sovereign of which their owners are citizens or subjects, and form a part of the territory of such sovereign. And, wherever such vessels or boats may be, while engaged on public waters in foreign or interstate commerce, in the view of the law, they constitute a part of the territory of the sovereign to which they belong.

Henry's Admiralty Jurisdiction and Procedure, sec. 37, p. 107.
Wharton's Conflict of Laws, sec. 356.
Wilson *vs.* McNamee, 102 U. S., 574.
The Lamington, 87 Fed. Rep., 754.

As between the several States in the American Union, a ship at sea, or a licensed and enrolled steamboat on a public navigable river, is presumed to belong to the State of which its owner is a citizen or resident, and to be a part of its territory and hence such ship or vessel or boat is within the jurisdiction of such State, and subject to the operation of its laws, though it may be within an arm

of the sea, or in a part of the river within the territorial limits of another State, when the facts giving rise to the controversy occur.

Crapo *vs.* Kelly, 16 Wallace, 610.
McDonald *vs.* Mallory, 77 New York, 546.
St. Louis *vs.* The Ferry Company, 11 Wallace, 423, 431–432.

39 The principle has been applied particularly to taxation. The question first arose in Hays *vs.* Pacific Mail Steamship Company, 17 Howard, 596. In that case the stockholders in the vessel resided in New York, but the corporation had agencies at Panama and San Francisco, and a navy dock and yard at Benicia, California, for the purpose of repairing and furnishing supplies. On arriving at San Francisco, the vessel usually remained a day only to unload her freight and passengers, and proceeded to Benicia to — repairs and refitting for the next voyage, and usually remained there for ten or twelve days. The vessel was a part of a line of steamers plying between New York and San Francisco, carrying freight and passengers, and was an ocean ship, owned and registered in New York, where taxes were assessed upon it as taxable property belonging to its owner, who was a resident. This route and this mode or proceeding was the permanent, regular and continued business of the ship.

Under this state of facts, the State of California undertook to levy taxes upon the ship as taxable property, and did collect such taxes, and the suit was brought by the owner to recover them back. The Supreme Court of the United States held that the vessel was not subject to taxation by the State of California, because it was not within its jurisdiction.

See: St. Louis *vs.* The Ferry Company, 11 Wallace, 423.

The question came again before the Supreme Court of the United States in Morgan *vs.* Parham, 16 Wallace, 471.

In that case the vessel was regularly registered at New York, to which it belonged—that is to say, New York was its home port—or "the port nearest to which its owner, husband or acting and managing owner usually resided."

The vessel was one of a daily line of steamers between New York and New Orleans, La. The vessel was enrolled by its master as a "coaster" at Mobile, Ala., and its license as a coaster was renewed from year to year. In its voyages from New York to New
40 Orleans it stopped temporarily at the port of Mobile, engaged in lawful commerce. The State of Alabama required by a statute that the vessel should be enrolled and licensed under the authority of the State, and the circuit court of the United States for the southern district of Alabama sustained the law, and required the vessel to be enrolled, and to take out the license under the law. The Supreme Court of the United States reversed the judgment. It held that the vessel had not become incorporated into the personal property of the State of Alabama, and that no State but that in which

the vessel had its home port had dominion over it for the purpose of taxation. It held further that the fact that the vessel was enrolled by its master as a coaster at Mobile, and that its license as a coaster had been renewed from year to year, did not affect the registry in New York, or its ownership there, and consequently that the vessel was not taxable in Alabama.

See also: Sinnot *vs.* Davenport, 22 Howard, 227, and Foster *vs.* Davenport, 22 Howard, 244.

The home port of the "Chas. H. Organ" is West Memphis, Arkansas, where it is agreed in the record that the West Memphis Packet Company, its owner, resides. The fact the boat is enrolled and licensed at the custom house in Memphis does not determine that that is the home port of the boat. The license and enrollment are there simply because Memphis is the nearest port of the United States to the residence of the owner. Such license and enrollment are only *prima facie* evidence of the fact of the home port being there, and may be contradicted, as has been done in the agreed case.

Henry's Admiralty Jurisdiction and Procedure, sec. 49, pp. 138–141.
The Mary Chilton, 4 Fed. Rep. 847.
The E. A. Barnard, 2 Fed. Rep. 712.
The Jennie B. Gilkey, 19 Fed. Rep. 127.
The Superior, Newberry's Reps. 176.
41 The Sarah Starr, 1 Sprague's Reps. 453.
The Martha Washington, 1 Clifford's Reps. 463–466.
St. Louis *vs.* The Ferry Company, 11 Wallace 631.
The Havana, 64 Fed. Rep. 496.
The New Brunswick, 125 Fed. Rep. 568.

Justice Gray, in delivering the opinion in Pullman Car Co. *vs.* Pennsylvania, 141 United States, 23, said: "Ships or vessels engaged in interstate or foreign commerce, upon the high seas or other waters, which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicile of their owners, in one State, are not subject to taxation in another State, at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not in any proper sense abiding within its limits, and have no continual presence or actual situs within its jurisdiction, and therefore can be taxed only at their legal situs, their home port, and the domicile of their owners."

141 U. S. 23.

It was decided in the case of the State tax on foreign held bonds, 15 Wallace, 300, that the tax laws of a State can have no extra-territorial operation. In applying the principle it was held that the power of taxation of a State is limited to persons, property and business within its jurisdiction, and that all taxation by the State must

relate to one of those subjects. In that particular case it was held that negotiable bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the State in which the company issuing the bonds is incorporated, they are property beyond the jurisdiction of that State, and are not subject to taxation by the State.

42 The principle was applied in Louisville and Jeffersonville Ferry Company *vs.* Kentucky, 188 U. S. 385.

Indiana granted a franchise for maintaining a ferry across the Ohio river, from the Indiana shore to the Kentucky shore. That franchise was granted to a Kentucky corporation which held also a Kentucky franchise, to carry on the ferry business from the Kentucky shore to the Indiana shore.

The ordinance of Virginia, of 1787, ceding the northwest territory to the United States, as construed by the courts, extended the boundary of Kentucky to low water mark on the Indiana side of the Ohio river—that is, it embraced within Kentucky all of the Ohio river within the low water mark.

Henderson Bridge Co. *vs.* Henderson City, 173 U. *173 U.* S. 609.

Kentucky undertook to assess for the purpose of taxation the franchise of operating the ferry. In doing so, it capitalized the *het* earnings of the ferry company exercising the franchise, at six per cent. It ascertained the value of the property that would be thereby produced, and from that sum deducted the value of the -angible property of the ferry company, in Kentucky and Indiana, and left a sum which it found to be the value of the ferry company's franchise, and on this sum, levied the tax.

The court held that the taxation of the Indiana franchise by Kentucky would amount to a deprivation of property without due proceed of law, in violation of the provisions of the fourteenth amendment to the Constitution of the United States. In delivering the opinion, Justice Harlan said: "There is, in our judgment, no escape from the conclusion that Kentucky thus asserts its authority to tax a property right, an incorporeal hereditament which has its situs in Indiana. While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by the principle inhering in the very nature of constitutional government, namely, that the taxation im-

43 posed must have relation to a subject within the jurisdiction of the taxing government.

188 United States, 396.

And see: Railroad *vs.* Jackson, 7 Wallace 262.

Erie R. R. *vs.* Pennsylvania, 153 U. S. 628, 646.

Our claim, therefore, is, that the steamboat "Chas. H. Organ," under the facts of these cases, is employed exclusively in interstate commerce, and that both it and the plaintiff and appellant, James

Foppiano, while upon it, and engaged in the sale of beer and liquors from the bar rented from its owner, the West Memphis Packet Company, are each within the jurisdiction of the State of Arkansas, and outside the jurisdiction of the State of Tennessee, and not subject to the requirements of a license by the State to carry on the business, and not subject to taxation by the State for carrying it on, and that the steamboat and James Foppiano each stand upon the same plane of exemption.

In Railroad Company *vs.* Maryland, 21 Wallace, 456, Justice Bradley said: "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal goverments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature had prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse; no franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State
44 interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible.

21 Wallace, 470.

And see: The *Mnotell*, 20 Wallace, 430.

The Robert W. Parons, 191 U. S. 17.

We readily conceded, under the facts in these cases, the jurisdiction of the State of Arkansas, which has created the West Memphis Packet Company as a corporation, and granted it the powers it exercises, and has also granted the ferry franchise to operate the ferry to and from Arkansas and Tennessee shores, to license and tax the business or ferry franchise, as well as the tangible property of the West Memphis Packet Company, within the local jurisdiction of the State. And the fact is, the State of Arkansas has granted the license and has levied a tax for the carrying on of the business, or on the ferry franchise, and the West Memphis Packet Company has accepted the license and paid the tax.

See: Wiggins Ferry Co. *vs.* East St. Louis, 107 U. S. 365.

Atlantic and Pacific Tel. Co. *vs.* Philadelphia, 190 U. S. 163.

Transportation Company *vs.* Wheeling, 99 U. S. 273.

The very fact that the State of Arkansas has jurisdiction to license and tax, and has in fact issued the license and levied the tax upon the West Memphis Packet Company, or the ferry franchise, are the reasons and ground why the State of Tennessee cannot possess or have jurisdiction to do the same thing. Both States cannot license

and tax the same privilege or the same franchise proceeding exclusively from one.

Railroad *vs.* Jackson, 7 Wallace, 268.

It need not be repeated again that if the steamboat "Chas. H. Organ" is out of the State of Tennessee, for the purpose of license and taxation, that Foppiano, while engaged in business as a barkeeper on board the boat, as to the business he carries on, is also outside such jurisdiction, for the purposes of license and taxa-
45 tion, although he may reside personally in the State or be personally within its limits.

(3.)

Our next position is, that independently of the State law, and outside the proposition that the steamboat "Chas. H. Organ" and James Foppiano while on board engaged in selling beer and liquors, are outside the jurisdiction of the State of Tennessee, that the requirements of the license to sell beer and liquors on board the steamboat, and the levy of the tax for the privilege of carrying on the business, violate that provision of the Constitution of the United States, which authorizes Congress to regulate commerce with *of*reign nations and among the several States.

Among the propositions which Justice Brewer stated to have been adjudicated, and to be no longer open to discussion, in his opinion in the recent case of The Atlantic and Pacific Telegraph Co. *vs.* Philadelphia, 190 United States, 160, are these:

(1.) "As said by Justice Bradley, speaking for the court in Robbins *vs.* Shelby Taxing District, 120 U. S. 489, 492: 'The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation.' And (2). No State can compel a party, individual or corporation to pay for the privilege of engaging in interstate commerce."

190 United States, 162.

It was said in the court below, by the circuit judge, in his opinion, that James Foppiano, as barkeeper on the steamboat "Chas. H. Organ," selling beer and liquors from the bar, had nothing to do with the interestate commerce carried on by the West Mem-
46 phis Packet Company by means of that steamboat, which he conceded could not be taxed, and could not be licensed or regulated by the State of Tennessee. He said the commerce could go on just as well without Foppiano and his bar as with them.

We do not see how the business carried on by Foppiano, which is itself interstate commerce, in the sense of the law, can be separated from the other business of the interstate commerce carried on

through or by means of the steam-boat—that is to say, the transportation of freight and passengers between Arkansas and Tennessee. Neither do we see how Foppiano's right to protection in his business, from the demand of the State of Tennessee for a license and tax, if it is a separate and distinct business of itself, depends in any way upon his business being a part or portion of that carried on by the West Memphis Packet Company, in the transportation of freight or passengers across the river.

If Foppiano merely had a skiff of his own and rowed it by himself back and forth across the river, and in doing so charged for freight and passengers transported, and in the course of his trips across the river, or on one side or the other, when he was landed, while engaged in such commerce, sold beer or liquors or merchandise to his passengers, or any on board his skiff desiring to buy, what he did would still, in the sense of the law, be interstate commerce. It would not be on a large scale, it is true, but nevertheless it would be the commerce protected from State interference or State taxation by the Constitution of the United States. It can make no difference that his business is carried on on a steamboat.

But the fact is, that Foppiano's business, in a general sense, is the business of the West Memphis Packet Company. It rents him the bar, and he pays rent. The rent increases the revenues of the business, and Foppiano's business is deemed by the West Memphis Packet Company a proper accessory to its other business of carrying passengers and freight. His sale of beer and *and* liquors on
47 board the steamboat is considered to add to the profits of the business, and also to the comfort and pleasure of the passengers transported.

The West Memphis Packet Co. has the right to carry on the business of interestate commerce, so far as it is not trammeled by the law governing such commerce, in its own way, and according to its own discretion. It has the right to employ as many people on board as it chooses, and to designate their occupations, and they all become its agents or instruments for the carrying on of the commerce it is engaged in.

The Daniel Ball, 10 Wallace, 557.

The plaintiff, Foppiano, as barkeeper on the steamboat, selling liquor and beer from the bar on the boat to those on board, is a mariner—that is to say, he is employed on board the steamboat to assist in its navigation and preservation in the general sense of the law. The term "mariner" includes not only the officers and the ordinary seamen, or helpers on board the ship, or steamboat, but also includes surgeons, carpenters, coopers, stewards and cooks employed on board as such. It may include women as well as men. The pilot, the deck hands, the engineers and the firemen employed on board a steamboat have all been held to fall under the denomination of "mariners."

It is enough that the person employed on board the ship or steam-

boat, in whatever capacity, has to do with its equipment or preservation, or renders services pertaining to the business of navigation, and that such services are necessary, or at least conducive to the preservation of the ship or steamboat, or the welfare of those employed in her navigation, or being transported, or accommodated on board.

1 Conkling's Admiralty, pp. 107–109.
Spinetti *vs.* The Atlas Steamship Co., 80 N. Y. 71.

48 It is a well known fact—such a fact as the judges of the courts must judicially know—that all steamboats navigating the Mississippi and other rivers of the United States, have on them bars at which beer and liquors are sold by barkeepers by retail to all persons applying on board to make purchases. Such bars are always considered by the owners navigating steamboats to be necessary, or at least a proper and convenient appurtenance to the navigation of the boat. Barkeepers are to be found upon every steamboat, and such has been the fact ever since steamboats were put upon the rivers. In The Commonwealth *vs.* Rogers, 135 Mass., 539, Colburn, judge, defined a public bar to be a counter, table, shelf, or other similar device designed and used for the purpose of facilitating the sale and delivery of liquors there kept, to anyone who may apply for them to be then and there drunk, not in connection with meals, lunches or food.

In 2 Parsons on Sh-pping and Admiralty, 182–183, in defining the jurisdiction of admiralty, which is confined to commerce and navigation on public navigable waters, it is said: "Seaman may sue in admiralty, and so may the pilot, engineers, firemen and deck hands on board a steamboat, and so may all persons serving in a way either essentially or materially, and directly useful to the navigation of any vessel, as the mate and engineer of an enrolled steamer employed in towing vessels in and about the harbor of Boston, pursers, stewards, cooks, ship carpenters, coopers on whaling voyages and indeed all officers of a vessel except the master. Whether a surgeon or physician may sue in admiralty for his wages, is not perhaps entirely settled by authority. On principle we should say he had this right. So a woman, if she performs a seaman's work, may sue as a seaman. So may persons hired principally for their skill as wreckers, who are also required to aid in the management of the vessel."

We agree we have not found any case exactly like Foppiano's case.

49 The case of State *vs.* Fr-ppart, 31 Louisiana, 340, was a case where the steamboat was engaged in commerce along the Mississippi river, between Louisiana, Arkansas and Mississippi. New Orleans was the home port of the steamboat. It had a bar on board and along the river, on both sides, at the towns and landings in Louisiana, Arkansas and Mississippi, Fr-ppart sold beer and liquors, just like Foppiano has been and is doing from the steam-

boat "Chas. H. Organ." At one of the towns in Louisiana he was arrested for selling liquors without a license and without having paid the tax required by the State law. The supreme court of Louisiana held that he could not be licensed and taxed for selling beer and liquors from the bar on board the steamboat, as doing so would be a regulation of commerce, and in violation of the Constitution of the United States.

The distinction between Frappart's case, just stated, and Foppiano's case, consists in the fact that the steamboat in Frappart's case belonged to the State of Louisiana, and the license and tax were demanded by that State, whereas, in Foppiano's case, the steamboat "Chas. H. Organ" belongs to the State of Arkansas and the license and tax are demanded by the State of Tennessee.

We submit that the principle established, running through a great number of cases, protects Foppiano from the demand of the State of Tennessee that he take out a license and pay a tax.

Gould on Waters, sec. 35; and cases cited.

In order to sustain this position, we will state some of the decided cases and refer to others.

The case cited on the other hand, State *vs.* Blands, decided by the court of appeals of St. Louis, 74 S. W. Rep., 3, if it applies to this case at all, need scarcely be noticed. It contains neither reason nor argument, and cannot be regarded as affecting the authority of the decisions we refer to.

In the case of the State Freight Tax, 15 Wallace, 232, the
50 court held that the transportation of freight or of the subjects of commerce is a constituent part of commerce itself. It held further, that a tax upon freight transported from State to State is a regulation of commerce among the States. It held further, that transportation of passengers or merchandise through a State, or from one State to another, is national in its nature, and admits of one uniform system or plan of regulation, and hence is exclusively within the regulating control of Congress.

It held that the State statute in question in that case, which imposed a tax upon freight taken up within the State and carried out of it, or taken up without the State and brought within it, was repugnant to that provision of the Constitution of the United States which ordains that Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

In the Gloucester Ferry Company *vs.* Pennsylvania, 114 U. *U.*, 196, the court defined commerce among the States to consist of intercourse and traffic between their citizens, and held that it included the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase and sale and exchange of commodities.

The court held further, that the commerce with the foreign nations, and between the States, which consists in the transportation of

persons and property between them, is a subject of national character, and requires uniformity of regulation. Following out the other propositions, it held further that the business of receiving and landing passengers and freight is incident to their transportation, and that a tax upon such receiving and landing is a tax upon transportation and upon commerce, interstate or foreign, involved in such transportation.

It held further that transportation of passengers and freight
51 for hire, by a steam ferry, across the Delaware river, from New Jersey to Philadelphia, by a corporation of New Jersey, was interstate commerce, and was not subject to taxation by the State of Pennsylvania. It held further, that freedom of transportation between the States, or between the United States and foreign countries, implies exemptions from charges, other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property. And, finally, it held that the only interference by a State with the landing and receiving of passengers or freight arriving by vessels from another State, or from a foreign country, which is permissible, is confined to measures to prevent confusion among the vessels and collisions between them, to insure their safety and convenience, and to facilitate the discharge or receipt of their passengers and freight.

And see: St. Clair Co. *vs.* Interstate Car Transfer Co., 109 Fed. Rep. 741, and 192 U. S., 455.

In Hall *vs.* Decuir, 95 United States, 485, the act of the General Assembly of Louisiana providding that all those engaged in the transportation of passengers among the States, should give to all persons traveling within Louisiana, upon vessels employed in such business, equal rights and privileges, in all parts of the vessel, without distinction on account of race or color, was in question.

The steamboat "Governor Allen" was enrolled and licensed under the laws of the United States for the coasting trade, and was a regular packet for the transportation of freight and passengers between New Orleans, Louisiana, and Vicksburg, Mississippi, touching at intermediate landings both within and without Louisiana, as occasion required. Mrs. Decuir, a person of color, took passage on the
boat on her trip up from New Orleans, for Hermitage, a land-
52 ing place within Louisiana. She was refused accommodation in the cabin especially set apart for white persons, on account of her col-r, and brought the suit to recover damages against the owner of the steamboat. The defence was, among other things, that the State law was void because it was an attempt to regulate commerce among the States, and in conflict with the Constitution of the United States. The plaintiff had a verdict in the court of original jurisdcition, and the judgment of that court was affirmed in the supreme court of Louisiana, and the owner of the steamboat sued

out a writ of error to the Supreme Court of the United States, and that court reversed the judgment.

In his opinion, the Chief Justice first stated instances in which States may legislate incidentally affecting interstate or foreign commerce, but not regulating it, and then continued: "But we think it may safely be said that the State legislation which seeks to impose a direct burden upon interstate commerce, or interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business th-our*h*out his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to
53 meet just such a case that the commercial clause in the Constitution was adopted."

95 U. S. 489.

And then, and particularly applicable to the present case, the Chief Justice said further: "The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations, by which he is to be governed, from one end to the other of his route, is a necessity in his business, and to secure it Congress, which is untrammeled by State lines, has been invested with the ex-

clusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may as well against those engaged in foreign; and the master of a ship clearing from New Orleans to Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, 'exemplary as well as
54 actual,' by anyone who felt himself aggrieved because he had been excluded on account of his color.

95 United States, 489-490.

And see:

The Roanoke, 189 U. S., 185, 194-199.
Wabash Ry. Co. vs. Illinois, 118 U. S., 557, 564, &c.

In Moran vs. New Orleans, 112 United States, 69, a municipal ordinance of the city of New Orleans established the rate of tax for a license for professions, callings, and other business, and assessed and directed it to be collected from persons owning and running tow boats to and from the gulf of Mexico and the city of New Orleans. The court held the ordinance as so applied was a regulation of foreign commerce, or commerce among the States, and an infringement of the Constitution of the United States, and therefore void.

In the Passenger cases (Smith vs. Turner) 7 Howard, 283, the law of the State of New York required the masters of vessels engaged in foreign commerce to pay a certain sum to a State officer on account of every passenger brought from a foreign country into New York, or before landing any alien passenger in the State.

The Supreme Court of the United States held that such law was inoperative, because of its conflict with the Constitution of the United States empowering Congress to regulate commerce.

In Sinnot vs. Davenport, 22 Howard, 227, the State of Alabama had a law requiring the owners of steamboats navigating the waters of the State, before such boat should leave the port of Mobile, to file a statement in writing in the office of the probate judge setting forth (1) the name of the vessel; (2) the name of the owners; (3) his or their place or places of residence; and (4) the interest each had in the vessel.

The steamboat "Bagaby" was engaged in navigation and commerce between New Orleans and Montgomery and Wetumpka, Alabama. Its owners contested the validity of the law. The
55 Supreme Court of the United States held that as the vessel was enrolled and licensed under the act of Congress for carrying on the coast trade, the law was void as to it, because in conflict with the Constitution empowering Congress to regulate commerce with foreign nations and among the several States.

In the next case, Foster vs. Davenport, 22 Howard, 244, the same principle was extended to a steamboat emplo-ed at Mobile as a lighter and towboat, sometimes towing vessels beyond the outer bar

of the bay, and into the Gulf to the distance of several miles, the court holding that the character of the navigation and business in which the boat was employed could not be distinguished from that in which the vessel it towed, or unloaded, were engaged.

In Philadelphia & The Southern Steamship Co. vs. Penn., 122 U. S., 326, the court held that a State tax upon the gross receipts of a steamship company incorporated under the laws of such State, which were derived from the transportation of persons and property by sea, between States, and to and from foreign countries, was a regulation of interstate and foreign commerce in conflict with the exclusive powers of Congress under the Constitution, and not collectible.

In Sherlock vs. Alling, 93 U. S., 99, 102, the court held "that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. The decisions go that extent and their soundness is not questioned. * * * Upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public water, or prescribed conditions in accordance with which commerce in particular articles, or between particular places, was required to be conducted.
56 In all the cases, the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on."

This language was quoted and approved by the court in McCall vs. California, 136 U. S., 113-114.

In Harman vs. Chicago, 147 U. S., 396, an ordinance of the city of Chicago, imposing a license tax for the privilege of navigating the Chicago river and its branches, upon steam tugs, licensed by the United States authorities, under the provisions of the Revised Statutes of the United States, sec. 4321, was held to be an unconstitutional exercise of municipal authority, and to be invalid.

In that case, Justice Field, after stating the provisions of the act of Congress, sec. 4311 of the Revised Statutes of the United States, and saying it was substantially the same as the statute involved in Gibbons vs. Ogden, 9 Wheaton, 1, quoted from what Chief Justice Marshall said in that case, as follows: "These privileges cannot be separated from the trade, and cannot be enjoyed unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it conveys the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade, would be, we think, to disregard the apparent intent of the act."

9 Wheaton, 213.

147 United States, 405.

In Leloupe *vs.* Port of Mobile, 127 United States, 640, it was held that telegraphic communications are commerce, as well as in the nature of postal service, and if carried on between different States, they are interstate commerce and within the power of regu-
57 lation conferred upon Congress, free from the control of State regulations, except such as are strictly of a police character. And that any State regulation by way of tax on the occupation or business, or requiring a license to transact such business is unconstitutional and void.

It was held further, that a general license tax on a telegraph company affects its entire business, interstate as well as domestic or internal, and is unconstitutional.

Robbins *vs.* Shelby County Taxing District, 120 U. S., 489, arose in Memphis, and after this court had sustained the State law, 13 Lea 303, was taken to the Supreme Court of the United States and the judgment reversed. The law undertook to require the payment of a tax by all drummers and persons not licensed in the taxing district, offering goods for sale by sample or otherwise, as a condition of carrying on the business. It was held to be intended to apply to persons doing business in another State, and as to them to be a regulation of commerce among the States, and to be void on that ground. It was held further, that interstate commerce can not be taxed at all by a State, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State.

This court in Hurford *vs.* The State, 91 Tenn., 66, applied the principle declared in Robbins *vs.* Taxing District, to the case of an agent, or drummer, not a resident of the State taking orders in the State, by his non-resident principals, to be sent into the State upon the orders, and held a provision of the revenue act of 1891, making such occupation a privilege to be taxed, void, because it was a regulation of interstate commerce.

In State *vs.* Scott, 98 Tennessee, 254, there was a similar decision as to the revenue a-t of 1895, imposing a privilege tax on one soliciting in the State, pictures to be enlarged outside the State.

Almost every case on the subject of interstate commerce decided since, has referred to Robbins *vs.* The Taxing District, and
58 it has become a leading case. Justice Bradley, after stating as settled propositions (1) that the power of Congress to regulate commerce with foreign nations and among the several States, is necessarily exclusive, whenever the subject is national in its character, or admits only of one uniform system, and (2) that the failure of Congress to regulate such commerce expressly, indicates its will that the subject shall be left free from all restrictions or impositions, and stating the only cases in which such commerce can be legitimately affected by State laws, (120 U. S., 492–494), said: "In a word it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the

freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject." 120 United States, 494.

The cases of Asher *vs.* Texas, 128 United States, 129, and Stoutenborough *vs.* Hennick, 129 United States, 141, have followed, and are based upon Robbins *vs.* The Taxing District.

In Crutcher *vs.* Kentucky, 141 U. S., 47, it was held that a law of Kentucky providing that an agent of an express company not incorporated in that State should not carry on business there without a license from the State, and without satisfying the State auditor that the company he represented possessed an actual capital of a certain sum, and subjecting him to a fine if he engaged in the business without the license, so far as it applied to a corporation of another State engaged in such business, was a regulation of interestate commerce, and to that extent repugnant to the Constitution of the United States, and void.

In Welton *vs.* The State of Missouri, 91 United States, 275, a statute of Missouri required the payment of a license tax from persons selling goods, wares and merchandise, not the growth, pro-
59 duce or manufacture of the State, by going from place to place to sell the same in the State, but required no such license tax from persons selling in a similar way such goods, wares and merchandise, the growth, produce or manufacture of the State, and the court held that the statute was in conflict with the power vested in Congress to regulate commerce with foreign nations and among the several States, and was void. It held further, that a license tax required for the sale of property is, in effect, a tax upon the property itself.

In Stockard *vs.* Morgan, 185 United States, 27, Stockard represented exclusively persons, corporations or firms residing in other States, and engaged in the sale of merchandise, but had his office or place of business in Chattanooga, where he kept samples, stationery and other articles, and traveled around on foot daily, or frequently, in drumming or soliciting orders for goods to be sent to his principals, and to be shipped by them from their places of business, according to the orders, into Tennessee, if accepted. Upon receipt of the orders Stockard forwarded them to his principals. Sometimes he exhibited samples and sometimes he took orders without showing samples. At the end of each month or at stated periods, he was paid a commission by his principals, on the sales he made.

Upon this state of facts it was claimed on the part of the State that Stockard was taxable as a merchandise broker, and should pay a privilege tax. This court sustained the claim of the State. The Supreme Court of the United States reversed the judgment. It said the principle involved had been decided in Brown *vs.* Maryland, 12 Wheaton, 419, and in Welton *vs.* Missouri, 91 United States, 275, and that the subsequent case of Robbins *vs.* Shelby Taxing District, 120 United States, was decisive of the case. In answer to a state-

ment made in the opinion of the court that the thing taxed
60 in that case was the occupation of merchandise broker, and not the business of those employing the broker, the Supreme Court of the United States, in its opinion, said: "When the tax is applied to an individual within the State, selling the goods of his principal, who is a non-resident of the State, it is in effect a tax upon interstate commerce, and that fact is not in any wise altered by calling the tax one upon the occupation of the individual residing within the State while acting as the agent of a non-resident principal. The tax remains one upon inter-state commerce, under whatever name it may be designated.

158 United States, 37.

The principle decided, as stated in the syllabus, is as follows: "Although a State has general power to tax individuals and property within its jurisdiction, yet it has no power to tax interstate commerce, even in the person of a resident of the State."

Brennan *vs.* Titusville, 153 U. S., 296, 300, etc.

Each Kentucky and Ohio incorporated a company to construct a bridge across the Ohio river, forming the boundary between the two States at Cincinnati. The Kentucky line extends to low water mark on the Ohio side of the river, as stated elsewhere. After the company authorized to construct the bridge had been incorporated in both States, the legislature of Kentucky undertook to prescribe charges to be collected by the company for passage over the bridge, and to make the taking of rates in excess of the charges prescribed a criminal offense.

The bridge company was indicted for violating the law, and was found guilty by the courts of Kentucky, and the case taken to the Supreme Court of the United States. That court reversed the judgment, and held (1) that the traffic by the bridge across the river was interstate commerce; (2) that the bridge was an instrument of such commerce; (3) that the statute of Kentucky was an attempted regulation of such commerce, which the State had no constitutional power to make; (4) Congress alone possessed the requisite
61 power to enact a uniform scale of charges in such a case, the authority of the State being limited to fixing tolls on such channels of commerce as are exclusively within the territory of such State.

Covington & Cincinnati Bridge Co. *vs.* Kentucky, 154 U. S., 204.

In Fargo *vs.* Michigan, 121 United States, 230, it was held that a State statute which levies a tax upon the gross receipts of railroads, for the carriage of freights and passengers into, out of, or through the State, is a tax on commerce among the States, and therefore void.

In Norfolk & Western R. R. Co. *vs.* Pennsylvania, 136 United

States, 114, a railroad was a link in a through line of road, by which passengers and freight were carried into a State from other States, and from that State also to other States, and the court held that the railroad was engaged in the business of interstate commerce. It held further that the State in which the railroad so forming a link in the through line of road was situated could not collect a tax from the corporation owning such road for the privilege of keeping an office in the State for the use of its officers, stockholders, agents and employés, such corporation being a corporation created by another State.

In McCall *vs.* California, 136 United States, 104, an agency of a line of railroad between Chicago and New York was established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take the line of that railroad at Chicago. But that agency was not engaged in selling tickets for the route, or receiving or paying out money on account of it.

The State of California required a license, and undertook to levy a tax upon the agency so established and maintained. It was held that the agency was engaged in interstate commerce, and that the tax was upon interstate commerce, and could not be collected.

62 The argument was made in that case that the agency in California had no necessary connection with commerce between Chicago and New York, or that the connection was so very remote and the hindrance of business so insignificant that there could be no objection to the requirement of a license or the levy of a tax, and that such requirement did not interfere with interstate commerce. In delivering the opinion, Justice Lamar said, in reply to the proposition just stated: "that the essentiality of the business of the plaintiff in error to the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce. It may be readily admitted, without prejudicing his defence, that the road would continue to carry passengers between Chicago and New York even if the agent had been prohibited altogether from pursuing his business in California. The test is, was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent."

136 United States, 111.

In Pickard *vs.* The Pullman Southern Car Co., 117 U. S. 34, the act of Tennessee of March 16th, 1877, Acts of 1877, chapter 16, page 26, imposing a privilege tax upon every sleeping car used or run over a railroad in Tennessee not owned by the railroad on which it was run or used, was held to be void so far as it applied to the interestate transportation of passengers carried over railroads in Tennessee into or out of or across Tennessee in sleeping cars owned by a

Kentucky corporation and leased by it for transportation purposes to a Tennessee railroad company, the latter receiving the transit fare and the former the compensation for the sleeping accommodations.

63 See the discussion by Justice Blatchford, 117 U. S., 48–51. This case has been followed by Allen *vs.* Pullman's Palace Car Co., 191 U. S., 171. That case took a distinction expressed as follows:

"A State may not impose a tax which is in any way a burden upon interstate commerce, but it may impose a privilege tax upon corporations engaged in interstate commerce for carrying on that part of their business which is wholly within the taxing State, and which tax does not affect their interstate business, or their right to carry it on in that State."

Applying the principle thus declared, the court held following the case just stated, 117 U. S., 34, that the provision in that act of Tennessee of 1877, that sleeping cars companies doing business in the State should pay a certain sum per annum per car, and which act by its terms applied to cars running through the State, was repugnant to the commercial clause of the Federal Constitution, and void.

It held further, however, that the Tennessee act of 1889, providing that sleeping car companies pay a tax per annum in lieu of all other taxes, except an *ad* valorem tax, for one or more passengers taken up at one point within the State, and delivered at another, and transported wholly within the State, and which did not refer to or affect the interstate business of the company, was not repugnant to the commercial clause of the Federal Constitution, and was valid.

In Kelley *vs.* Rhoads, 188 U. S., 1, a herd of sheep driven at a reasonable rate of speed from a point in Utah across the State of Wyoming, a distance of about 500 miles, to a point in Nebraska, for the purpose of shipment by rail from the latter point, was held to be properly engaged in interstate commerce, to such an extent as to be exempt from taxation by the State of Wyoming under a statute taxing all livestock brought into the State for the purpose of being grazed.

64 It was held further that the fact that sheep were maintained by grazing along the route, and that the owner could have shipped them to their ultimate destination from a point on the same railroad, which could have been reached from the starting point without entering the State of Wyoming, was not material, and did not change the result.

In Bowman *vs.* Chicago & N. W. Ry. Co., 125 U. S., 465, the State of Iowa had a law that no common carrier should bring into the State any intoxicating liquors from another State without being first furnished a certificate from the auditor of the county to which the liquors were to be transported — was authorized to sell such liquors in the county. The railway company was a common carrier between Chicago, Illinois, and Marshalltown, Iowa, and Bowman

tendered to it beer to be carried from Chicago to Marshalltown and it refused to receive it because of the Iowa law, and the fact that Bowman did not furnish the certificate required by law.

Bowman thereupon sued the railway company for not receiving and carrying the beer, and it set up the Iowa law and the want of the certificate in defence.

The Supreme Court held that Iowa could not enact the law, even to protect its people against the evils of intemperance, as it was, when applied to the case presented, a regulation of interstate commerce, and the plaintiff was entitled to recover from the defendant.

And see: Minnesota *vs.* Barber, 136 U. S., 313.

Brimmer *vs.* Rebman, 138 U. S., 76.

In Leisy *vs.* Hardin, 135 U. S., 100, Gus Leisy & Co. manufactured beer at Peoria, Illinois, and sent it in quarter-barrels, or eight- of barrels, or kegs, and in cases containing quart bottles, by railroad to Keokuk, Iowa, consigned to John Leisy, their agent resid-
65 ing there on the premises owned by a member of the firm, who offered it for sale and sold it in the kegs or cases in which it was sent.

Hardin a constable, under a warrant issued by a justice of the peace, seized a number of such kegs and cases of beer. Gus Leisy & Co. then replevied the property seized. The ground of the seizure was that the statute of Iowa prohibited the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical and sacramental purposes, and then only under a license from a county court of the State, and that Gus Leisy & Co. or John Leisy, their agent, sold and offered to sell the kegs and cases of beer in violation of the statute. The supreme court of Iowa decided for the defendant. The Supreme Court of the United States reversed the judgment of the supreme court of Iowa, and held that the statute of Iowa, as applied to sales by Gus Leisy & Co., or John Leisy, their agent, in the kegs and cases, of the beer brought to Iowa from Illinois, was unconstitutional and void, because repugnant to the clause of the Constitution of the United States granting to Congress the power to regulate commerce with foreign nations and among the several States.

The case of Lyng *vs.* Michigan, 135 U. S., 161, immediately followed Leisy *vs.* Hardin. Hagemeister & Co. manufactured beer at Green Bay, Wisconsin, and owned a warehouse at Iron River, Michigan, to which they sent and in which they stored quantities of such beer. Lyng was the agent at Iron City of Hagemeister & Co., and took orders, and sold and delivered beer in the original packages in quantities exceeding three gallons and remitted the proceeds of the sales to Hagemeister & Co. at Green Bay. The statute of Michigan levied an annual tax upon the introduction by the manufacturer of beer manufactured outside of Michigan, into the hands of consumers or retail dealers in the State, and also upon the business of selling beer at wholesale or retail. Neither Hagemeister & Co. nor
66 Lyng paid the taxes required by the statute, and Lyng was

indicted and convicted upon the facts above in the State court of a violation of the statute.

The Supreme Court of the United States reversed the judgment, holding that the statute was an interference with interstate commerce, and a violation of the Constitution of the United States.

The court said: "The power cannot be conceded to a State to exclude, directly or indirectly, the subjects of interstate commerce, or by the imposition of burdens thereon to regulate such commerce without congressional permission," and that "the same rule that applied to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Michigan, the tobacco of Maryland and Connecticut, or of the products, natural or manufactured, of any State, applied to all the commodities in which a right of traffic existed, recognized by the laws of Congress, the decisions of the courts, and the usages of the commercial world."

135 U. S., 166–167.

It was argued below, and we suppose will be here, that these cases are controlled by the Wilson act, passed Aug. 29th, 1890, enacting that "all fermented, distilled and other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

26 Statutes at Large, U. S., ch. 728, p. 313.

67 It would seem that the phraseology of the act is itself an answer to the argument, especially when taken in conjunction with the decisions of the courts made since its enactment. It was not intended by the act in any way to interfere with the carrying on of commerce between the States. The case *In re* Rahrer, 140 U. S., 545, sufficiently shows that the act was intended to operate only on liquors, or liquids introduced into a State or Territory from another State after they have become incorporated into and a part of the property of the State or Territory into which they have been introduced. This proposition is decided in Rhodes *vs.* Iowa, 170 U. S., 412, where a statute of Iowa prohibiting the moving of liquors brought into the State was involved, and it was held, among other things, that the moving of a box of spirituous liquors, shipped by rail from Illinois to Iowa, in the station from the platform on which the box was put on arrival, to the freight warehouse, is a part of the interstate commerce transportation, and not a violation of the Iowa statute.

That we are right is also shown by Vance *vs.* W. A. Vandercook Co. (No. 1.), 170 U. S., 438, where Justice White, delivering the

opinion, said that the scope and effect of the act of Congress had been settled *In re* Rahrer, and Rhodes *vs.* Iowa, and that "the purpose of Congress in adopting it was to allow State laws to operate on liquors shipped into one State from another, so as to prevent the sale in the original package in violation of State laws."

He then proceeded to show that the statute of South Carolina involved in that case was not a regulation of interstate commerce, because it only operated to prohibit the sale of the liquor in the original packages after it had become incorporated as a part of the property of the State, and that Congress, by the act we are considering, had given its consent that the State should enact the statute.

170 U. S., 445, etc.

68 This question, we submit, has been placed at rest by the case of Norfolk & Western Ry. Co. *vs.* Sims, 191 U. S. 441, decided December 7th, 1903. In that case it was held that the States have no power to tax directly, or by license upon the importer, goods imported from foreign countries or other States while in their original packages, or before they have become commingled with the general property of the State, and lost their distinctive character as imports.

Applying the principle decided, the court held further in that case that in cases not arising under the police power, where an article is made in one State and shipped in its original package in pursuance of an order to a person in another State, to be there delivered on payment of the agreed price, the sale is actually made in the former State, and the seller cannot, by reason of the delivery of the article and the passing of the title of the property in the latter State, be subjected to a license tax imposed by it on persons engaged in the sale of similar articles within that State.

If we have to rely exclusively on the last position argued, we submit that the judgment of the court below must be reversed, because they have sustained the laws of the State regulating commerce between Tennessee and Arkansas, clearly in violation of the Constitution of the United States.

April 14th, 1904.

RANDOLPH & RANDOLPH,
Attorneys for James Foppiano and Leslie L. Harrell.

69 In the Supreme Court of Tennessee.

JAMES FOPPIANO
vs.
R. A. SPEED, Clerk, etc. } No. 43, Law Docket, Shelby.

JAMES FOPPIANO
vs.
R. A. SPEED, Clerk, etc. } No. 44, Shelby Law Docket.

L. L. HARRELL
vs.
R. A. SPEED, Clerk, etc. } No. 48, Shelby Law Docket.

It is agreed that the above three cases may be tried together.

The statement of the facts *are* fully set out in the appellant's brief,—the facts having been agreed to in each of the cases,—and in each case the facts being practically the same.

It must be remembered that this is not an attempt to collect any tax whatever from the ferry company or from the steam-boat, nor is it an attempt to collect an ad valorem tax, but it is a privilege tax against appellant for exercising the privilege of selling liquor at retail on a steam-boat as required by the revenue act of 1903 under the head of liquor dealers, which is on pages 614 and 615 Acts 1903, and which is contained in the Revenue Acts of 1899 and 1901 under same heading.

The wording of the act is very clear, and we submit that the agreed facts bring *bring* appellant within its meaning, and that he is subject to said tax.

Foppiano and Harrell operate bars upon steam-boats; sell liquor and beer at retail to any person applying whilst the boat is
70 at the landing in Tennessee.

In this cause it is first insisted that the county court clerk could not back assess a privilege tax payer, but back assessment applies only to ad valorem tax. The back or re-assessment in the present case was made by the clerk upon a motion made by the revenue agent, and citation issued thereon more with a view of ascertaining whether or not Foppiano was subject to a tax than otherwise, as plaintiff insists, a distress warrant could have been issued without notice and the goods of plaintiff seized without giving him a chance to be heard. The clerk (defendant herein), preferred giving plaintiff a chance to be heard, and did so.

This back assessment was made in accordance with the assessment law of 1903, chapter 258, sec. 31, Acts 1903. But even if the back assessment was invalid and conceding that it was, for the purpose of argument, still Foppiano could not recover in this suit unless it be shown that he was not subject to the payment of this tax. The gist of the case is whether he should or should not have paid this

tax. As above suggested the citation issued by the clerk and proceedings thereunder, were only preliminary matters, simply to ascertain the fact of his liability, and at the same time giving the plaintiff Foppiano the right to disprove the fact of his liability for the payment of this tax. So far as the record shows this proceeding of back assessment did not cost him a cent. The clerk's costs were the same, the revenue agent's fees of 15 per cent. upon all collections was the same, being fixed by section 81 of chapter 258 Acts 1903.

In other words if it was an error on the part of the clerk to give Foppiano this chance to show that he was not liable for this tax, it was an error committed manifestly for his benefit and did him no possible harm. Though I insist that the clerk followed the law.

Secondly, it is insisted that Foppiano was not subject to
71 this tax because he was engaged in inter-state commerce?

This theory of plaintiff's counsel is based on section 16 of chapter 257. This section deals with the criminal feature of the law, it must be read as a whole, it states that the exercise of any business or avocation declared to be a privilege is a misdemeanor, fixes the punishment, and then says: "but the inhibition shall not apply to persons engaged in inter-state commerce." In other words, the clerk could not have sworn out a criminal warrant or procured an indictment against Foppiano for not paying this tax if he was engaged in inter-state commerce, as he could another who was not engaged in inter-state commerce. The only remedy of the clerk was a civil one, viz: to proceed to collect the license tax.

The only difference made in the statute is that one not engaged in inter-state commerce may be proceeded against both civilly and criminally, whilst one who is engaged in inter-state commerce cannot be proceeded against except by civil process. This is obvious from a casual reading of the statute relied upon.

The application by the courts of the clause of the Constitution of the United States giving rise to all of the cases involving questions of inter-state commerce, apply to original packages,—as when the original package is broken after having arrived within the importing State, the courts have uniformly held that such breaking is a commingling of such goods with other goods of the States which makes such imported goods taxable.

Leisy *vs.* Hardin, 135 U. S. 100.

The decision in this case brought about the passage by Congress of an act—see Revised Statutes U. S. (supplement) page 779, which act practically eliminated intoxicating liquors from the protection of the inter-state commerce clause in the Constitution of the U. S., and left the question of sales and taxation of intoxicating
72 liquors entirely within the jurisdiction of the several States.

26 Statutes at Large, U. S. chap. 728, page 313.

Vance *et al. vs.* Vandercook Co. 170 U. S. 445, *et seq.*

It must be conceded that the sale of intoxicating liquors and the taxation for such sales must be under the police power of the State.

See above case, also.

2nd. ed. Am. & Eng. Encyclopædia Law, vol. 17. p. 291 *et* —.

The courts have gone very far in sustaining laws to prohibit the sale of intoxicating liquors, as will be seen by reading section with relation thereto in the 17" vol. 2nd edition of the Am. and English Encyclopædia of Law,—and especially so since the passage of the act of Congress above referred to passed Aug. 8th 1890. They have held that intoxicants could only be sold in certain districts or by certain people. Tennessee at the last two sessions of the legislature passed the act prohibiting the sale of intoxicants in towns of less than 5,000 inhabitants, and our supreme court upheld same.

In other words, the courts hold that the legislature can pass such laws as it may see fit as to these sales, whether to prohibit entirely or make such restrictions as it may see fit as to licenses, etc.

As to sales upon steam-boats engaged in inter-state commerce, a case in point is the case of Blanz vs. State, 74 South Western Reporter 3.

The court in this case holds that a steam-boat must comply with the liquor laws of every State or county in which it makes sales of intoxicants.

The numerous cases cited by appellants in their brief, we submit have no bearing whatever upon this case, all of them apply to a tax
73 upon the importaion of goods from one State into another or a discrimination against persons so importing goods.

The act of Congress found in 26 Statutes at Large U. S. chapter 728, p. 313, above referred to, we submit settles this case; it places the traffic in intoxicating liquors upon a different basis than of other merchandise and leaves to the States the taxation and regulation of sales of intoxicants.

170 U. S. 445.

The contention of appellant that Foppiano and Harrell are engaged in inter-state commerce is not tenable—neither of them have any part in the management of the boat, are in no sense employees of the boat or ferry company—they simply rent the bar from the boat or ferry company, and operate it as a separate and distinct business from that of the ferry company. The operation of a bar on a ferry boat may be considered by the owners a profitable investment, but certainly it could not be construed that it was a necessary adjunct to the business, nor is it a necessity to the conducting of the business of a ferry boat.

Appellant claims that this court should not take judicial knowledge of the fact that all boats have bars. On the contrary, none of the boats on the Cumberland or other rivers in Tennessee, have bars, except the Mississippi.

The only case cited by appellant in *their* brief which in any way

bears upon the case at bar is the Frappert case, 31 Louisiana Aw. 340. This case was decided long before the act of Congress of 1890 above referred to, and a reading of the case will show that the boat was in transit when the sales were made. The sales in the case at bar were made while the boat was moored at her wharf at Memphis within the jurisdiction of Tennessee, at retail, by the drink. The court below gave the questions involved in these cases much thought, and we have taken the liberty of attaching his honor's opinion to our brief and making the same a part thereof.

74 In conclusion we submit that appellant engaged in the sale of liquor and beer upon a steam-boat at retail within the meaning of the revenue acts of Tennessee, and within the jurisdiction of Tennessee.

That appellant is in no way engaged in inter-state commerce, and under the act of Congress and revenue acts of Tennessee is subject to this privilege tax, and therefore cannot recover from appellee the amounts so paid to him as tax, clerk's fees and revenue agent's commission, as all were rightfully collected.

Respectfully, etc.

C. D. M. GREER,
For Appellee, R. A. Speed, Clerk, etc.

Filed April 20, 1904.

JNO. W. BUFORD, Cl'k,
By T. W. POPE, D. C.

75 In the Supreme Court of Tennessee.

JAMES FOPPIANO, in Error,
vs.
R. A. SPEED, Clerk,
} No. 43, Shelby Law Docket.

and

JAMES FOPPIANO, in Error,
vs.
R. A. SPEED, Clerk,
} No. 44, Shelby Law Docket.

and

LESLIE L. HARRELL
vs.
R. A. SPEED, Clerk.
} No. 48, Shelby Law Docket.

Brief for State.

The question to be determined in these cases is the liability of plaintiffs in error for the tax imposed by the acts of 1899–1901 and 1903, upon persons selling beer or any quantity of liquors on steamboats.

The cases were heard upon agreed statements of fact by the circuit

judge, who held Foppiano and Harrell liable for the tax and entered judgment against them, from which they have appealed to this court and assigned errors.

Facts.

James Foppiano, plaintiff in error, in cases # 43 and # 44 is lessee of the bar privileges upon the steamboat "Charles H. Organ," owned by the West Memphis Packet Company, a corporation, chartered under the laws of the State of Arkansas, and engaged in operating said steamboat between two or more points in the State of Arkansas and the city of Memphis in Tennessee. Said Foppiano as such lessee of the privilege of operating a bar upon said steamboat
76 has been engaged in selling liquors and beer thereon during the years 1901, 1902, and 1903, and is still so engaged. Liquors are sold from said bar at all times when customers desire to be served, and including such times as said steamboat may be at its landing place in Memphis, Tennessee. Said steamboat makes regular landings at its wharf in the city of Memphis there receiving and discharging freight and passengers during which time the said Foppiano, during the years aforesaid, has been making sales of liquor and beer to such persons as desire to make purchases thereof. The county court clerk of Shelby county was of the opinion that Foppiano was liable for the taxes imposed by the State of Tennessee upon persons selling beer and liquors on steamboats, and so notified said Foppiano through the revenue agent of the State.

After a hearing the county court clerk held that Foppiano was liable for said tax, and from such holding an appeal was taken by Foppiano to the State board of equalization which board affirmed the holding of the county court clerk, and thereupon plaintiff in error paid under protest the amount of the tax, with penalties and costs, and ins-ituted these suits to recover the same.

The Harrell case is not materially different in its facts from the Foppiano case, except that Harrell is engaged in selling liquor upon the steamboat "C. H. Hugo" owned by the West Memphis Packet Company, also a corporation of the State of Arkansas, and Harrell was also held liable for the tax for the year 1904, which he paid under protest and brought his action (# 48) to recover the same.

As to the taxes paid for and to cover the period of six months in advance, said payments were purely voluntary—no distress warrant had been issued—no seizure of property made.

The errors assigned are, in substance, as follows:

1. That plaintiffs in error, under the constitution and laws of the State of Tennessee, are not liable for the taxes in controversy.
77 2. That the steamboat "Charles H. Organ" and "C. H. Hugo," upon which plaintiffs in error were selling beer and liquors were, even when at their landings in the city of Memphis, not within the jurisdiction of the State of Tennessee, and therefore not subject to a license or tax by said State on any business carried on upon them or either of them.

3. That the attempts to tax plaintiffs in error were an unauthorized and unlawful interference with commerce between the States of Arkansas and Tennessee, and in contravention of the commerce clause of the Federal Constitution.

See Brief pp. 9–10.

The statutes under which the taxes in controversy were imposed upon plaintiffs in error contain the following provisions:

"Liquor Dealers. * * *

"Persons selling beer or any quantities of liquor on steamboats, flat boats, or any other vessel or water craft, or from railroad cars, shall pay a tax, each, in lieu of all other taxes, to be paid in any county they may elect, per annum, two hundred dollars."

Acts of 1903, ch. 257.
Acts of 1901, ch. 128.
Acts of 1899, ch. 232.

Before entering upon a discussion of the questions made by the assignments of error set out in the very elaborate brief of the learned counsel for plaintiff- in error, we will notice two minor points on said brief as follows:

1. It is insisted that the county court clerk had no authority to back assess the taxes for the years 1901, 1902, and 1903 upon the plaintiff in error Foppiano.

In reply thereto we submit:

(a.) That under sections 30 and 31 of ch. 258 of the Acts of 1903, the clerk of the county court not only had full authority, but it was made his express duty under a heavy penalty, to see that
78 the privilege taxes in question were paid and collected and to that end he had full authority to back assess any person who had been exercising a privilege without having paid the legal tax or license therefor.

(b.) It is immaterial whether the county court clerk was authorized to "back assess" Foppiano in the sense that term is used by our revenue statutes, because if Foppiano was liable for the taxes it was the duty of the county court clerk to issue a distress warrant against him for the purpose of collecting said taxes.

Acts of 1901, ch. 257 sec. 18.

So that the real question for the determination of this court is not whether the county court clerk proceeded properly against Foppiano, but whether Foppiano is liable for the taxes collected from him by the county court clerk.

2. It is next insisted that the privilege tax imposed upon plaintiffs in error was illegally laid upon them because after declaring the exercise of any of the privileges named in said ch. 257 of the Acts of 1903, without payment of the taxes prescribed for the exercise

of such privileges to be a misdemeanor, it was then provided as follows:

"But this inhibition shall not apply to any person, firm or corporation, engaged in interstate commerce."

Acts of 1903, ch. 257, sec. 16.

We submit that by no sort of construction can it be even plausibly claimed that a person engaged, as were plaintiffs in error, in selling liquor upon the steamboat plying between Arkansas and Tennessee was engaged in commerce between States, and this provision added nothing whatsoever to the act and was merely a declaration by the legislature that it was not intended to tax commerce between the States. In no event could the State have taxed such commerce and said provision added nothing whatever to the statute.

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1.

It is next insisted that the tax in question is inhibited by the declaration in the bill of rights in respect of the free navigation of the Mississippi river, and the right to such free navigation is inherent in every citizen of Tennessee.

Whatever rights the citizens of this State may have in the free navigation of the Mississippi river, certain such citizens as undertake to carry on a business upon the bosom of that stream and make use of Tennessee soil and Tennessee territory in the operation of said business must conform to the valid constitutional enactments of this State made under her police power. Certainly it was never intended that any citizen of this State should be beyond and without the control of the laws of this State merely because he was engaged in business which consisted in part of navigating or sailing upon said river.

2.

It is next insisted that plaintiffs in error in selling on the steamboats Organ and Hugo, even when said boats were at their respective landings in the city of Memphis, were outside of the jurisdiction of the State of Tennessee.

In discussing this assignment of error we submit with all respect for the able and learned counsel of plaintiff- in error, that he wholly misconceives the contention made by the State and the question at issue. Tennessee does not seek and has not attempted to levy any property tax, or in fact any other tax upon the steamboats "Organ" and "Hugo."

We can safely concede that for the purpose of ad valorem taxes these boats may be taxable only in the State of Arkansas, which is the domicile of the corporations owning these boats. Neither does the State claim any right to tax either said steamboats or plaintiffs in error, because said boats are fully licensed and enrolled at the

custom house in the port of Memphis, in compliance with the maritime laws of the United States.

80 Your honors will discover from an examination of the numerous authorities cited on the brief of plaintiffs in error (Tr. pp. 15 to 20) that the questions involved and determined in these cases were wholly dissimilar from the questions at bar and involved the right to tax either the property or stock of a corporation in a jurisdiction other than that of its domicile or home office.

We submit that when plaintiffs in error were engaged in selling beer and liquors from their respective bars upon the steamboats aforesaid when they were moored at their landings in Memphis, that they were upon the territory of the State of Tennessee, and within her jurisdiction.

The western boundary of the State of Tennessee is the middle line of the main channel of the Mississippi river. When the territory now the State of Tennessee was ceded by the State of North Carolina to the United States, the center of the main channel of the Mississippi river was the boundary separating North Carolina and the then Spanish territory west of that river.

Moss *vs.* Gibbs, 10 Heisk., 283.

Missouri *vs.* Kentucky, 11 Wall., 395.

And in Stockley *vs.* Cissna, decided by the circuit court of appeals of the sixth circuit, November 10, 1902, Judge Lurton in an elaborate opinion citing authorities, including the treaty of Paris of Sept. 21, 1782, and the act of Congress admitting Arkansas into the Union, held that the western boundary of Tennessee was and is the middle line of the main channel of the Mississippi river.

119 Fed. Rep., 821.

So that the jurisdiction of Tennessee extends to the middle of Mississippi river, and therefore it follows that when plaintiffs in error were engaged in selling liquor at the landings in Memphis they were upon Tennessee territory and subject to Tennessee laws.

81 It is next insisted that plaintiffs in error were engaged in commerce between the States, and therefore the attempt to tax them is in contravention of the commerce clause of the Federal Constitution.

We again submit that it is difficult to understand this contention, and we again suggest that on this point plaintiffs in error wholly misconceive the contention made by the State.

We do not seek to tax either of the steamboats used in transporting freight and passengers between Tennessee and Arkansas, nor do we attempt to lay any charge or tax upon the freight or passengers so transported. Certainly it cannot be claimed that when the plaintiffs in error are engaged in selling liquor at the landings in Memphis that such acts are either necessary or proper instrumentalities of interstate commerce. When so engaged plaintiffs in error are to

be treated exactly as other persons carrying on the business of selling liquor upon Tennessee territory.

It does not appear from what source plaintiffs in error procured their stock of liquors sold and retailed from their bars at the landings in Memphis, but even if it could be claimed that said stocks of liquor were purchased in the State of Arkansas and brought on said steamboats to the State of Tennessee it would not follow that either the liquors themselves or the business of selling them would be exempt from taxation.

We will not attempt to review the large number of authorities cited upon the brief of plaintiffs in error showing that the Supreme Court of the United States has held in any number of cases that attempts to tax the property or gross receipts of corporations engaged in interstate business, in jurisdcitions other than those of the States creating such corporations, or where the tax sought to be imposed was a burden upon the commerce carrying right between the
82 States, but conceding that said authorities would control upon facts similar to those stated in the cases referred to, we submit that the question for determination by this court in this case is in no wise touched upon by any of the authorities cited by the brief of plaintiffs in error, nor is it controlled either upon principle or by analogy by such authorities.

Leisy's case (135 U. *U.* 100) was one of *prohibition* and Lyng's case (136 U. S. 161) was one involving a *discriminatory tax.*

The decisions in the Bowman and Leisy cases resulted in an act of Congress, approved April 8, 1890, in which it was provided as follows:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subjected to the operation and effect of the laws of such State or Territory enacted in the exercise of its police power, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and sh-ll not be exempt therefrom by reason of being introduced therein in original packages or otherwise. 26 Stat. at L. 313, ch. 728."

The effect of this act of Congress removed all impediments to the enforcement of the State laws in repsect of the sale and taxation of intoxicating liquors, even when such liquors were imported in original paekages, and withdrew from the protection of the commerce clause of the Federal Constitution persons bringing liquor into a State for the purpose of sale without regard to the condition or means by which such liquors were held.

In re Raharer, 140 U. S. 545.

Vance *vs.* Vandecocke Co. (#1) 170 U. S. 446.

83 The learned counsel of plaintiffs in error falls into the mistake of supposing that whatever may be connected, even re-

motely, with an agency engaged in commerce between States is protected by the Federal Constitution, when the Supreme Court of the United States has repeatedly held that agencies employed in commerce between the States are subject to proper police power of the State.

It has been held that a State statute prohibiting the running of trains within the State on Sunday is not void as an interference with interstate commerce, though in effect it prevents trains from passing through the State on Sunday from and to adjacent States, but is a valid exercise of the police power.

Hennington *vs.* Georgia, 163 U. S. 299.
State *vs.* Southern Railway Co. 119 N. C. 814.

So, a State may require engineers and other persons engaged in the driving and man-gement of all railroad trains passing through the State to submit to an examination by a local board as to their fitness for their positions.

Richmond etc. R. R. Co. *vs.* Patterson Tobacco Co., 169 U. S. 311.
Missouri etc. R. R. *vs.* Haber, 169 U. S. 633.
Smith *vs.* Alabama, 124 U. S. 465.

So, a State may require, under penalties, the heating of passenger cars engaged in interstate commerce.

New York etc. R. R. Co. *vs.* New York, 165 U. *U.* 628.
L. & N. R. R. Co. *vs.* Mississippi, 133 U. S. 589.
Smith *vs.* State, 100 Tenn. 494.

We do not insist that these authorities, just cited, bear directly upon the point in controversy in this case, but they do show that instrumentalities engaged even in commerce between the States are not altogether free from the police power of the State.

Further, as held in one of the most recent terms of the
84 Supreme Court of the United States, a State may impose a tax upon intra-state business of a corporation engaged in carrying on an intra-state business.

Allen *vs.* Pullman Palace Car Co. 191 U. S. 171.

It is somewhat surprising to us that outside of the case to be presently cited, we have been unable to find any decision, either State or Federal, bearing upon the precise point in controversy in this case, although we would have supposed that in some form or other it had been before the Federal courts, especially in view of the fact that sleeping and dining cars of the Pullman Company, and the various railroad companies engaged in i-terstate business, and which usually vigorously oppose every form of taxation which can be brought within the control of the commerce clause of the Federal Constitution, are paying under it without question the taxes imposed upon the business of selling liquors from such sleeping and dining cars, and it is not improper to call the attention of the court — that

there is contained in the very provision authorizing the tax in question a like tax upon railroad cars from which beer or liquors are sold, and that such taxes are paid without question.

The only case which we have been able to find which presents facts similar to the case at bar is that of The State vs. Blands, reported in 74 Southwestern Reporter, p. 3, decided by the court of appeals of the State of Missouri on April 14, 1903, wherein it was held that a person selling intoxicating liquors from a steamboat at a landing on the Missouri side of the Mississippi river without license from the State of Missouri was violating the laws of that State, notwithstanding said liquors were sold from a steamboat engaged in an interstate business and owned by a firm or co-partnership residing in Memphis, Tennessee, where a tax had been paid to the county of Shelby and the State of Tennessee.

In that case the court said:

"The commission of the offense was completely established,
85 and the fact that it was perpetrated upon a steamboat at Tyler, Peimscott county does not legalize or condone the offense, nor is it affected by compliance by the defendant's employers with the Federal and State laws governing the liquor traffic at the home port in a State other than Missouri."

We therefore submit that plaintiffs in error were justly and legally liable to the State of Tennessee for the taxes imposed upon them and the judgment of the circuit court should be affirmed with costs.

Respectfully submitted,

____ ____,
Attorney General.

Since preparing the foregoing brief I find cited in Cooley on Taxation, the case of La Norris *vs.* State, 13 Texas App. 38–42, which involved the same principle as the one to be determined by your honors. In that case La Norris, a Pullman palace car conductor was indicted for unlawfully selling liquors in Wood county, Texas, without first paying the tax therefor.

The car from which the liquors *was* sold was used in interstate commerce, and the sale upon which the indictment was predicated was made in Wood county, Texas.

Article 10 of the Penal Code of Texas provides as follows:

"Any person who shall pursue or follow any business, calling or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes so due, and not more than double that sum."

La Norris was indicted and convicted for a violation of the provision above quoted and insisted that a sale from one on the Pullman cars while in transit was not a violation of law.

Said the Texas court, speaking through Willson, J.:

"We think it is clearly within the letter of the law, and we can
see no good reason why we should not hold it to be within
86 the spirit and intent of the law.

"The law is operating through the limits of the State, and

operates upon all alike. It makes no distinction between persons, whether they be travelling or stationery, whether they be the owners or conductors of a palace car, or the drivers of a hack or other vehicle. Whenever one of these pal-ce cars crosses the line into this State it is within the jurisdiction of the laws of this State, and all persons who are transported by it are subject to those laws, and as much bound to obey them as any citizen of the State. We could elaborate our views upon this question and advance many and cogent reasons for holding as we do, but we think it sufficient for us to say that neither the letter nor the spirit of the law exempts the Pullman Palace Car Company, or any other corporation or person, from its operation,—and that it is as much a violation of law to engage in the business of retailing spirituous liquors, without paying the occupation tax, upon a car travelling over a railroad, as it is to carry on that business in the usual mode.

We can see no sort of difference between a sale made from a Pullman car engaged in interstate commerce and a sale made from a steamboat, while within the jurisdiction of Tennessee, although it is engaged in plying the water of a navigable river between this and another State.

Respectfully submitted,

CHARLES T. CATES, JR.,
Attorney General.

Filed May 18th, 1904.

JNO. W. BUFORD, Clerk.

87 JAMES FOPPIANO vs. R. A. SPEED, Clerk, &c. } Jackson, April Term, 1904.

Opinion.

The facts upon which the questions to be determined in this case rest, fully appear in the agreed statement appearing in the record, and need not be more particularly referred to than as stated below.

For the purpose of deciding the questions involved, it need only be stated, that: The steamer C. H. Organ is owned by the West Memphis Packet Company, a corporation chartered under the laws of the State of Arkansas, and engaged in plying between two or more points in the State of Arkansas, and the city of Memphis, Tennessee; that Foppiano is the lessee of the bar privileges, and as such lessee retailed liquors and beer thereon during the years 1901, 1902, and 1903, and is still so engaged. Liquors are sold from the bar at all times when customers desire to be served, including such times as the boat may be at its landing in Memphis, Tennessee. The boat referred to makes regular landings at its wharf in the city of Memphis, there receiving and discharging freight and passengers. At which times, Foppiano, during the years aforesaid, has been ac-

customed to make sales of liquors and beer to such persons as desired to make purchases thereof.

The county court clerk of Shelby county, deeming Foppiano liable for the taxes imposed by the State of Tennessee upon persons selling beer and liquors upon steam-boats, notified him through the revenue agent of the State. After a hearing, the clerk held that Foppiano was liable for the tax, and from this holding an appeal was taken to the State board of equalization, which board affirmed the holding of the county court clerk. Thereupon plaintiff in
88 error paid, under protest, the amount of the tax, with penalties and costs, and instituted this suit to recover therefor.

The statutes under which the tax was imposed, contain the following provision:

"Liquor Dealers. * * *

Persons selling beer or any quantity of liquor, on steamboats, *salt* boats, or any other vessel, or water craft, or from railroad cars, shall pay a tax, each, in lieu of all other taxes, to be paid in any county they may elect, per annum, two hundred dollars." Acts of 1903, ch. 257; Acts of 1901, ch. 128; Acts of 1899, ch. 232.

1. It is insisted that the county court clerk had no authority to back assess the taxes for the years, 1901, 1902, and 1903, upon plaintiff in error Foppiano.

Section 30 of ch. 258, Acts of 1903 provides that the clerk of the county court shall collect all privilege taxes, section 31 provides: "That any property or properties included in this act shall be back, or reassessed for the period now provided by law, viz: (1) When the same have been ommitted from or escaped taxation; * * * ( ), When the owner, or his agent, fails, refuses, or neglects to list the property to the assessor, as required by law."

Section 46 provides: "That it shall be the duty of the assessor to make a return to the county court clerk of the name of each person, company, firm, or corporation engaged in any business liable in any way to pay a privilege tax in each district or ward under the provisions of the law. It shall be the duty of the judge or chairman of the county court, and of the county court clerk to examine the lists so returned, and compare the same with the list of persons paying privileges; and he shall report the same to quarterly court at the July term following the assessment, and the said report shall
89 be read in the full meeting of the county court."

See also, Acts 1901, ch. 174, sec. 31; Acts 1899, ch. 435, sec. 32.

Ordinarily, of course, the terms "assess" and "assessment" apply only to ad valorem taxation; but it is seen that under section 46, the duty is devolved upon the assessor to report to the clerk of the county court the names of persons exercising privileges, to the end

that such persons may be listed, and the amount of the privilege tax collected from them. Under section 48 it is made the duty of the clerk of the county court to collect all privilege tax.

Construing together the several provisions referred to, we think it clear that the word "assess" when used in connection with privileges taxes means simply the listing of the names of the persons exercising privileges, with the designation of the privilege. It may or may not include an extension of the amount fixed by the statute for the exercise of such privilege. In this sense, we think the clerk of the county court may "back assess" or "reassess" privilege taxes that have escaped listing and collection.

But we do not think that it is at all necessary that there should be such back assessment or reassessment of privilege taxes; since the statute fixes the amount, and makes it the duty of all persons exercising privileges to come forward and obtain a license from the clerk, and pay therefor the amount fixed by law. Acts 1903, ch. 258, sec. 28; ch. 257, sec. 14; Acts of 1901, sec. 18, ch. 174, sec. 28; *id.* sec. 48; Acts of 1899, ch. 435, sec. 29, 31; *id.* ch. 432, sec. 15. Under these statutes, it is not only the duty of the person exercising the privilege to promptly pay the tax, but it is also the duty of the clerk of the county court to call upon such person for the tax if he fail to pay; it is no less his duty, if such person has been exercising
90 the privilege for three years theretofore without payment, to take steps, by distress warrant or otherwise, to compel such payment. The limitation of three years is fixed in analogy to the limitations fixed upon other back taxes.

2. The center of the Mississippi river is the line between Tennessee and Arkansas, (Moss *vs.* Gibbs, 10 Heisk. 283; Stockley *vs.* Cisna, 119 Fed. Rep. 821; Missouri *vs.* Kentucky, 11 Wall., 395), and we are of the opinion that for exercising the privilege referred to within the limit just stated, plaintiff became liable for the tax.

3. We do not think that the retailing of liquors under the circumstances stated, (even though conducted on a steamboat engaged in interstate commerce), was, itself, interstate commerce. The question is discussed, and the reasons for this view are given, in an opinion delivered by the chief justice, at the present term, in the case of Leslie L. Harrell *vs.* R. A. Speed, clerk, to which we refer, without further elaboration.

Affirm the judgment of the court below, with costs.

NEIL, J.

Filed June 4, 1904.

JNO. W. BUFORD, Clerk,
By T. W. POPE, D. C.

91 In the Supreme Court of Tennessee, April Term.

LESLIE L. HARRELL
vs.
R. A. SPEED, Clerk, &c.

Opinion.

This case is before us on an agreed statement of fact, from which it appears, that the West Memphis Ferry Company, is a corporation duly created under the laws of the State of Arkansas, having its situs at West Memphis, in the county of Crittenden in that State, on the western bank of the Mississippi river; that the corporation, by its charter has a right to own and use water craft on that river and for three years, under the license duly and legally issued to it by the county of Crittenden, it has been operating ferry boats across the Mississippi river ca-yying passengers and freight from West Memphis and landing at its dock at the wharf at the city of Memphis in this State where it would discharge the same and take on other passengers and freight for transport to its home port and one or two other ports in the State of Arkansas; that a bar was maintained on each of its boats where liquors were sold; and that the privilege of keeping the bar on one of these boats was rented to Har-ell, the plaintiff in error, who had been, and was engaged in selling intoxicants by retail to passengers on its boats and such other persons as happened to come on board and desired to make purchases thereof.

For the exercise of this privilege, the State of Tennessee, through a proper officer, required Harrell, under the menace of a distress warrant, to pay the license tax which it was insisted, was due
92 under that portion of sec. 4 of chap. 257 of the Acts of 1903 which reads as follows: "Persons selling beer or any quantity of liquor on steam boats, flat boats, or any other vessel or water craft, or from railroad cars shall pay a tax, each, in lieu of all other taxes, to be paid in any county that may elect, per annum, two hundred dollars." This payment was made under protest and the present suit was brought to recover the money so paid, upon the ground that it was illegally exacted.

That the steam boats used by the West Memphis Ferry Company, in carrying on its business of transporting freight and passengers could be taxed in the State of Arkansas, and at the home port of the company and their situs when at rest, is settled in Ci. Trans. Co. *vs.* Wheeling, 9 Otto, 273. It is also settled that the State of Tennessee could neither impose a tax on the capital stock of this ferry Co., incorporated as it was by the State of Arkansas, (Gloucester Ferry Co. *vs.* Com. of Penn., 114 U. *U.* 196) nor upon the boats engaged, as they were, in interstate commerce and making as they did, only temporary landings at the wharf in the city of Memphis (St. Louis *vs.* Wiggins Ferry Co. 11 Wallace, 423).

The question then presented is, Does the principle which thus restrains the taxing power of this State both as to the capital stock of this company and of its boats employed in the ferry purposes, also prevent the exaction of a privilege tax, from one running a bar on one of these boats, while at its landing within the jurisdiction of this State?

We think it beyond doubt that the legislature of Tennessee could not impose a privilege tax upon this company, for disembarking and discharging its cargoes of freight at the wharf in the city of Memphis, or for gathering passengers and freight to be transported across the river to the State of Arkansas. (Gloucester Ferry Co. *vs.* Com. of Penn. *supra.*) The exemption from this tax rests upon the fact that receiving and landing passengers and freight were incident to their transportation without which there could be no
93 such thing as transportation of either across the Mississippi river. Such a tax would be a burden on interstate commerce and clearly unenforceable, (Henderson *vs.* Mayor N. Y., 92 U. *U.* 259).

But can the same thing be said as to the privilege license required for maintaining a bar for the sale of spirituous liquors on one of its boats? So far as the agreed statement of facts show the charter conferred no right on the company to maintain a bar, or rent the privilege of doing so to another, nor can we see that the exercise of such a privilege forms an essential part of the business which it is authorized to do.

But again, it is not disclosed that the liquors and beer dispensed to customers over the bar on the boat in question, were brought into this State from Arkansas or from any other foreign State so as, in any form, to give the plaintiff in error the benefit of the interstate clause of the Federal Constitution or any of the laws of Congress regulating commercial intercourse between the States. For all that appears in the record, the intoxicants kept and *dols* at this bar may have been purchased in Tennessee by Harrell for retail at the port of Memphis within this State. If this be the fact, we can see no reason why the plaintiff in error so retailing, should stand on any higher ground that the seller of drinks over the bar of any one of the saloons of that city.

But we do not deem it necessary to place this case on narrow or technical grounds, as we think the judgment of the trial court can be rested on the broader ground, that the imposition of the tax or license fee was distinctly within the police power of the State.

With regard to the retailing of intoxicants, there has never been a question as to the right of the several States to control the
94 subject. The long line of cases found in the reports of the Supreme Court of the United States, agree in affirming the general proposition, that the regulation of the manufacture and the sale of intoxicating liquors is peculiarly under the control of the States and within their police power which has not been surrendered to the Federal Government. License cases, 5 How. 504, Bar-

temeyer *vs.* Iowa, 18 Wallace 125, Boster Beer Co. *vs.* Mass., 97 U. *U.* 25, Foster *vs.* Kas. 112 U. S. 201, Mugler *vs.* Kas. 123 U. S. 623, Kidd *vs.* Pearson, 128 U. S. 1, Eilanbacker *vs.* Ply. Co., 134 U. S. 31.

In the earliest and most celebrated of these cases, reported under the title of the license cases, *supra*, there was involved a question of the constitutionality of certain laws passed by the legislatures of Massachusetts, New Hampshire and Rhode Island restricting the sale of liquors in these different States. In the New Hampshire case the courts of the State applied the statute then in force to the sale by the importer of a barrel of gin which was unbroken and in the same condition that it was when brought into the State. The justices of the Supreme Court of the United States agreed in maintaining the constitutionality of this statute, though they rested their conclusions on different grounds. Chief Justice Taney in an opinion universally recognized as of great ability, while conceding the power of Congress to deal exclusively with the subject of the importation of intoxicants and when so dealing with it that its action would supplant all repugnant statutes passed by the States, yet held that the acts in question were valid because Congress had not legislated with regard thereto. This view was the prevailing one with that court for many years, as the reasoning of the Chief Justice was often referred to, and the decision was as often cited with approval.

But in Bowman *vs.* Chicago & North Western Railway Co., 125 U. S. 465, the authority of these cases was greatly weakened. The Bowman case involved the validity and statute of the State of
35 Iowa which imposed a penalty upon any railroad company or other common carrier that should knowingly bring into the State any intoxicating liquor without first having obtained a certificate from the proper authority certifying that the consumer was authorized by the laws of Iowa to sell such liquors. While the court recognized that this statute had been passed for the purpose of carrying out the general legislative design to protect the health and morals of the people of that State, yet it was held to be unconstitutional upon the ground that it was an effort to regulate commerce between the States. While the court did not in express terms overrule the license cases, and the later cases resting for authority on them, yet there was a clear suggestion throughout the argument of a doubt as to the soundness of the conclusions announced therein. But what the court seemed to hesitate to do in the Bowman case was expressly done by a majority opinion in Leisy *vs.* Hardin, 135 U. S. 100. There is was held that the importation of liquors from foreign countries, and from one State to another, was a subject which required a general and uniform rule for its regulation, free from State interference, and therefore the States were without authority to control the subject, even though Congress had not enacted any legislation with regard thereto.

The opinions in these two later cases attracted great attention and produced a feeling of discontent among those who believed the liquor traffic in all of its forms should be under the supervision of the vari-

ous States. This *convicted* was so wide spread, and such pressure was brought to bear upon Congress, that in 1890 it passed an act, popularly known as the Wilson bill, which provided that "all fermented, distilled or other intoxicating liquors, or liquids transported into any State or Territory or remaining therein for the use, or consumption, sale or storage therein, shall upon arrival in such
96 State or Territory, be subject to the operation or effect of the laws of such State or Territory * * * and shall not be exempt therefrom by reason — being therein in original packages or otherwise."

The constitutionality of this law was attacked in Wilkerson *vs.* Rahrer, 140 U. S. 561, but it was there sustained as a proper exercise of legislative power.

But it is to be observed that the authority of Bowman *vs.* Chicago Ry. Co. *supra*, and of Leisy *vs.* Hardin, *supra*, were never extended further than to protect the importer of original packages of fermented or distilled liquors or beer, as long as they were unbroken, and by necessary implication, excluded from the exemption from State control, those engaged in the mere retail liquor business. As to them and their business, no doubt ever did exist of the State's power of regulation by the imposition of privilege taxes or otherwise and the only effect of the Wilson bill was to hand over the importer even with his original package, after the terminus of its transit had been reached, to the control of the State.

So it is that the importer of intoxicants whose packages have reached such terminus, and the retailer now stand on the same ground and are equally under the strong and restraining hand of the several States.

But it is said, however, in the argument of the counsel for plaintiff in error, that this act was not intended to interfere with the interstate commerce of intoxicants; but its operation was confined to liquors or liquids introduced into a State or Territory after they had become mingled with the mass of the taxable property of such State or Territory, and for this proposition, Wilkerson *vs.* Rahrer, *supra*, Rhodes *vs.* Iowa, 170 U. *S.* 412, and Vance *vs.* Vandercock Co. 1, — 438 are cited by counsel.

To this contention, it may be replied, that, were this its only effect, then it was idle legislation. For, it was never a matter
97 of doubt, the absolute right of the State to control by taxation or otherwise, either intoxicants or any other character of property, when once incorporated with the general mass of property within the State. As has been seen, as to intoxicants, the struggle upon the part of the States, was to assume control while they were in unbroken packages, in the hands of the importer. It was against this claim, the cases of Bowman *vs.* Chicago — North Western Ry. Co. *supra* and Leisy *vs.* Hardin, *supra*, were leveled. It was there, however, conceded, and so far as we know, it has been uniformly so, that when once the original packages is broken, it has passed beyond the limit of Federal control, and into that of the State.

Nor do the cases, upon which the counsel for plaintiff in error rests for this contention, support it. In Wilkerson *vs.* Rahrer, *supra*, the court having discussed the restricted effect, upon the legislation of the several States, of the Bowman and Leisy cases then adds, (refferring to the Wilson bill): "Congress has now spoken and declared that imported liquor or liquids shall upon arrival into a State, fall within the category of domestic articles of a similar nature. Is the law open to constitutional objection?" In Rhodes *vs.* State of Iowa, *supra*, it is said: "It has been settled that the effect of the act of Congress is to allow the statutes of the several States to operate upon packages of imported liquor before sale," but it was at the same time held that State legislation of a restricted character could not attach to such packages, "the moment they reached the State line and before the completion of the act of transportation." The first of the syllabus in Vance *vs.* Vandercook Co. *supra*, clearly shows that it is in accord with the Wilkerson and Rhodes cases. It is as follows: "Under the act of August 8th, 1890, (Wilson bill) the restriction and regulations of State laws became operative on the original packages of intoxicating liquors imported into a State be-
98 fore the sale thereof, and therefore such packages cannot be sold if the State law forbids the sale or can be sold in the manner and form prescribed by the State regulations.

We have been referred to the case of State *vs.* Frappert, 31 La. An. 340, where it was held that the imposition of a license tax for selling beer and liquors from a bar on a steamboat plying between ports in the State of Louisiana and Mississippi, at one of the intermediate ports, was an unauthorized interference with commerce between the States. This case it may be conceded sustains the contention of plaintiff in error, but we are unable to agree with it, as in our view the retailing of liquors does not in any way constitute interstate commerce.

It follows that the judgment of the court below is affirmed.

BEARD, C. J.

Filed June 4, 1904.

JNO. W. BUFORD, Clerk,
By T. W. POPE, D. C.

99 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State, for the western division thereof, at the April term, A. D. 1904—present: The Hon. W. D. Beard, chief justice, and J. S. Wilkes, W. K. McAlister, M. M. Neil, and Jno. K. Shields, associate judges—when the following proceedings were had, to-wit:

JUNE 13, 1904.

JAMES FOPPIANO, in Error,
vs.
R. A. SPEED, Clerk.
} No. 43, Law Docket, Shelby County.

Be it remembered that this cause came on to be heard on this the — day of June, 1904, before the honorable, the judges of the supreme court of Tennessee, upon the transcript of the record from the circuit court of Shelby county, the assignment of error on behalf of the plaintiff in error, James Foppiano, and the reply thereto on behalf of the defendant in error, and argument of counsel having been heard, and the court being of opinion that there is no error in the judgment of the circuit court of Shelby county, and that the plaintiff in error is not entitled to recover the amount of taxes sued for, but is liable for such taxes as a retail liquor dealer, it is therefore ordered, adjudged and decreed that the judgment of the circuit court of Shelby county be and the same is hereby in all things affirmed; and it is further ordered and adjudged that said plaintiff in error, James Foppiano, and his surety on appeal bond, J. C. Wyckoff, pay all the costs of this cause, for which execution may issue.

Upon the trial of this cause the plaintiff in error insisted that the steamboat Charles H. Organ when at the wharf in
100 Memphis was in Arkansas territory and in selling liquors at retail at the wharf in Memphis he was engaged in interstate commerce, and that therefore he was protected from taxation by the State of Tennessee by the commerce clause of the Federal Constitution, that is, subsection 3 of section 8 of article 1 of the Constitution of the United States and the acts of Congress; but the court held as set out in the opinion filed in this cause, and in the cause of Harrell *vs.* Speed, clerk &c., that plaintiff in error was not engaged in interstate commerce, so as to be protected by any act of Congress or to be protected by or to bring his acts within said provision of the Constitution of the United States above referred to, and that said steamboat was not in Arkansas territory but, when said sales of liquors were made it was within the territorial limits of the State of Tennessee, to which holding of the court plaintiff in error excepted.

This cause was by consent of parties consolidated and heard along with the causes of James Foppiano, in error, *vs.* R. A. Speed, clerk, No. 44 Shelby law docket, and Leslie L. Harrell, in error, *vs.* R. A. Speed, clerk, No. 48 Shelby law docket; and it is ordered that the opinion of the court in said cause of Leslie L. Harrell, in error, *vs.* R. A. Speed, clerk &c., delivered through Mr. Chief Justice Beard, and to which reference is made in the opinion of this court, delivered in this cause through Mr. Justice Neil, be and the same is hereby filed in this cause, and made a part of the record herein, as an additional opinion of the court herein.

101 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State, for the western division thereof, at the April term, A. D. 1904—present: The Hon. W. D. Beard, chief justice, and J. S. Wilkes, W. K. McAlister, M. M. Neil, and Jno. K. Shields, associate judges—when the following proceedings were had, to-wit:

JUNE 13, 1904.

JAMES FOPPIANO, in Error,
vs.
R. A. SPEED, Clerk.
} No. 44, Shelby Law Docket.

Be it remembered that this cause came on to be heard on this the — day of June, 1904, before the honorable, the judges of the supreme court of Tennessee, upon the transcript of the record from the circuit court of Shelby county, the assignments of error on behalf of the plaintiff in error, James Foppiano, and the reply thereto on behalf of the defendant in error, and argument of counsel having been heard, and the court being of opinion that there is no error in the judgment of the circuit court of Shelby county, and that plaintiff in error is not entitled to recover the amount of taxes sued for, but is a liable for such taxes as retail liquor dealer, it is therefore ordered, adjudged and decreed that the judgment of the circuit court of Shelby county be and the same is hereby in all things affirmed; and it is further ordered and adjudged that said plaintiff in error, James Foppiano, and his surety on appeal bond, J. C. Wyckoff, pay all the costs of this cause, for which execution may issue.

Upon the trial of this cause plaintiff in error insisted that the steamboat Chas. H. Organ was, when at the wharf in Memphis, in Arkansas territory, and in selling liquors at retail at the
102 wharf in Memphis, Tennessee, he was engaged in interstate commerce, and that therefore he was protected from taxation by the State of Tennessee by the commerce clause of the Federal Constitution, that is, sub-section 3 of section 8 of article 1 of the Constitution of the United States and the acts of Congress; but the court held, as set out in the opinion filed in this cause, and in Harrell *vs.* Speed, clerk, and James Foppiano *vs.* Speed, clerk, (No. 43), that plaintiff in error was not engaged in interstate commerce so as to be protected by any act of Congress, or to be protected by or to bring his acts within that provision of the Constitution of the United States above referred to, and that said steamboat was not in Arkansas territory when said sales of liquor were made but was within the territorial limits of the State of Tennessee, to which holding of the court plaintiff in error excepted.

This cause was by consent of parties consolidated and heard along with the causes of Leslie L. Harrell, in error *vs.* Speed, clerk, &c. (No. 48 law docket of Shelby county) and James Foppiano in error

vs. Speed, clerk &c. (No. 43 Shelby law docket), and it is hereby ordered that the opinions of this court in said causes be and the same are adopted and made a part of the record in this cause.

103 THE UNITED STATES OF AMERICA:

In the Supreme Court of Tennessee, at Jackson, April Term, 1904.

JAMES FOPPIANO, Plaintiff and Appellant,
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County, Defendant and Appellee.

Comes now the plaintiff and appellant, by his attorneys, and complains that in the record and proceedings had in the said cause, and also in the rendition of the judgment in the above entitled cause in the supreme court of Tennessee, sitting at Jackson, at the April term thereof, A. D. 1904, against the said plaintiff and appellant, on the — day of June, 1904, manifest error has happened, to the great damage of said plaintiff and appellant; wherefore, the said plaintiff and appellant prays for the allowance of a writ of error, and for an order fixing the amount of bond for such writ of error in the said cause, and for such orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated this — day of June, 1904.

RANDOLPH & RANDOLPH,
Attorneys for Plaintiff and Appellant.

Allowed, and bond for writ of error fixed at the sum of five hundred ($500.00) dollars, by

W. D. BEARD,
Chief Justice of the Supreme Court of Tenn.

Filed June 13, 1904.

JNO. W. BUFORD, Clerk.

104 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of Tennessee, sitting at Jackson, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James Foppiano, as plaintiff, and Rob't A. Speed, as clerk of the county court of Shelby county, as defendant, wherein was drawn in question the validity of a treaty or statute of,

or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said James Foppiano, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of
105 right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 11th day of June, in the year of our Lord one thousand nine hundred and four.

{Seal of the Circuit Court of the United States for the District of West Tennessee.}

DAN. F. ELLIOTTE,
Clerk of the Circuit Court of the United States for the Western District of Tenn.

Allowed by
W. D. BEARD,
Chief Justice Supreme Court of Tennessee.

106 [Endorsed:] No. 43. James Foppiano, pl'ff & appellant, vs. Robt. A. Speed, as clerk of the county court of Shelby county, def't & appellee. Writ of error to Supreme Court of the United States. Randolph & Randolph.

107 THE UNITED STATES OF AMERICA:

In the Supreme Court of Tennessee, at Jackson, April Term, 1904.

JAMES FOPPIANO, Plaintiff and Appellant,
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County, Defendant and Appellee.

Know all men by these presents, that we, James Foppiano, as principal, and Wm. B. Gates, as surety, are held and firmly bound unto the defendant, Rob't A. Speed, as clerk of the county court of Shelby county, in the full and just sum of five hundred ($500.00) dollars, to be paid the said defendant, as clerk of the county court of Shelby county, his certain attorneys, executors, administrators, or assigns—to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this — day of June, 1904.

Whereas, lately, in the supreme court of the State of Tennessee, sitting at Jackson, in a suit pending in said court, between James Foppiano, as plaintiff and appellant, and Rob't A. Speed, as clerk of the county court of Shelby county, as defendant and appellee, a judgment was rendered against the said James Foppiano, and the said James Foppiano having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Rob't A. Speed, as clerk of the county court of Shelby
108 county, citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be held at the city of Washington, on the second Monday of October, 1904, next.

Now, the condition of the above obligation is such, that if the said James Foppiano shall prosecute said writ of error to effect, and answer all damages and costs, if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

JAMES his x mark. FOPPIANO. [SEAL.]

WM. B. GATES. [SEAL.]

——— ———. [SEAL.]

Sealed and delivered in the presence of,
Witness:
WM. M. RANDOLPH,

Approved by—
W. D. BEARD,
Chief Justice Supreme Court of Tennessee.

Filed June 13, 1904,

JNO. W. BUFORD, Clerk.

109 THE UNITED STATES OF AMERICA:

In the Supreme Court of Tennessee, at Jackson, April Term, 1904.

JAMES FOPPIANO, Plaintiff and Appellant,
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County, Defendant and Appellee.

To Rob't A. Speed, as clerk of the county — of Shelby county:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington, on the second Monday of October, 1904, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Tennessee, sitting at Jackson, wherein James Foppiano is plaintiff and appellant, and Rob't A. Speed, as clerk of the county court of Shelby county, is defendant and appellee, to show cause, if any there be, why the judgment in the said writ of error, mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of June, 1904.

W. D. BEARD,
Chief Justice of the State of Tennessee.

Rob't A. Speed, as clerk of the county court of Shelby county, defendant and appellee, mentioned above, hereby acknowledges service of the above citation, and, reserving all rights of defence, agrees to enter his appearance thereto in the Supreme Court of the United States, in the above cause, at the time designated.

Done this 13 day of June, 1904.

CHARLES T. CATES,
Attorney General.

Filed June 13, 1904,

JNO W. BUFORD, Clerk.

110 THE UNITED STATES OF AMERICA:

In the Supreme Court of Tennessee, at Jackson, April Term, 1904.

JAMES FOPPIANO, Plaintiff and Appellant,
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County, Defendant and Appellee.

Comes now the above plaintiff and appellant, by his attorneys and complains that in the record and proceedings had in the said cause,

and also in the rendition of the judgment in the above entitled cause in the supreme court of Tennessee, sitting at Jackson, at the April term thereof, A. D., 1904, against the said plaintiff and appellant, on the — day of June, 1904, manifest error has happened, to the great damage of said plaintiff and appellant; wherefore, the said plaintiff and appellant prays for the allowance of a writ of error, and for an order fixing the amount of bond for such writ of error in the said cause, and for such orders and process as may cause the same to — corrected by the Supreme Court of the United States.

Dated this — day of June, 1904.

RANDOLPH & RANDOLPH,
Attorneys for Plaintiff and Appellant.

Allowed, and bond for writ of error fixed at the sum of five hundred ($500.00) dollars, by,

W. D. BEARD,
Chief Justice of the Supreme Court of Tennessee.

Filed June 13, 1904.
JNO. W. BUFORD, Clerk.

111 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the supreme court of Tennessee, sitting at Jackson, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James Foppiano, as plaintiff, and Rob't A. Speed, as clerk of the county court of Shelby county, as defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said James Foppiano, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf,

do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error,
112 what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 11th day of June, in the year of our Lord one thousand nine hundred and four.

{ Seal of the Circuit Court of the United States for the District of West Tennessee. }

DAN. F. ELLIOTTE,
Clerk of the Circuit Court of the United States
for the Western District of Tenn.

Allowed by—
W. D. BEARD,
Chief Justice Supreme Court of Tennessee.

113 [Endorsed:] No. 44. James Foppiano, pl'ff & appellant vs. Rob't A. Speed, as clerk of the county court of Shelby county, def't & appellee. Writ of error to Supreme Court of the United States. Randolph & Randolph.

114 THE UNITED STATES OF AMERICA:

In the Supreme Court of Tennessee, at Jackson, April Term, 1904.

JAMES FOPPIANO, Plaintiff and Appellant,
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County, Defendant and Appellee.

Know all men by these presents, that we, James Foppiano, as principal, and Wm. B. Gates, as surety, are held and firmly bound unto the defendant, Rob't A. Speed, as clerk of the county court of Shelby county, in the full and just sum of five hundred ($500.00) dollars, to be paid the said defendant, Rob't A. Speed, as clerk of the county court of Shelby county, his certain attorneys, executors, administrators, or assigns—to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this — day of June, 1904.

Whereas, lately, in the supreme court of the State of Tennessee, sitting at Jackson, in a suit depending in said court, between James

Foppiano, as plaintiff and appellant, and Rob't A. Speed, as clerk of the county court of Shelby county, as defendant and appellee, a judgment was rendered against the said James Foppiano, and the said James Foppiano having obtained a writ of error and filed copy thereof in the clerk's office of the said supreme court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Rob't A. Speed, as clerk of the county court of Shelby county, citing and admonishing him to be and appear at a session of the
115 Supreme Court of the United States, to be held at the city of Washington, on the second Monday of October, 1904, next.

Now, the condition of the above obligation is such, that if the said James Foppiano shall prosecute said writ of error to effect, and answer all damages and costs, if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

JAMES his x mark. FOPPIANO. [SEAL.]

WM. B. GATES. [SEAL.]

Sealed and delivered in the presence of—
Witness:
WM. M. RANDOLPH.

Approved by—
W. D. BEARD,
Chief Justice Supreme Court of Tennessee.

Filed June 13, 1904.
JNO. W. BUFORD, Clerk,
By T. W. POPE, D. C.

116 THE UNITED STATES OF AMERICA:

In the Supreme Court of Tennessee, at Jackson, April Term, 1904.

JAMES FOPPIANO, Plaintiff and Appellant,
vs.
ROB'T A. SPEED, as Clerk of the County Court of Shelby County, Defendant and Appellee.

To Rob't A. Speed, as clerk of the county court of Shelby county:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington, on the second Monday of October, 1904, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Tennessee, sitting at Jackson, wherein James Foppiano is plaintiff and appellant, and Rob't A. Speed, as clerk of the county court of Shelby county, is defendant and appellee, to show cause, if any there be why the judgment in the said writ of error mentioned, should not

be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of June, 1904.

W. D. BEARD,
Chief Justice of the State of Tennessee.

Rob't A. Speed, as clerk of the county court of Shelby county, defendant and appellee, mentioned above, hereby acknowledges service of the above citation, and, reserving all rights of def-nce, agrees to enter his appearance thereto in the Supreme Court of the United States, in the said cause, at the time designated.

Done this 13th day of June, 1904.

CHARLES T. CATES, Jr.

Filed June 13, 1904.

JNO. W. BUFORD, Clerk.

117 THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect and complete copy of the transcripts of the records, assignments of error, brief for appellant, briefs for appellee, opinion of this court, decree of this court, petition for writ of error, bond for writ of error, writ of error, citation to appear before the Supreme Court of the United States, in the cases of James Foppiano *vs.* Robert A. Speed, clerk of the county *county* court of Shelby county, Tennessee, and opinion of this court in the case of Leslie L. Harrell *vs.* Robert A. Speed, clerk of the county court of Shelby county, Tennessee, pronounced by this court at its April term, 1904, as appears of record now on file in my office *my office.*

In testimony whereof, I have hereunto set my hand and affixed the seal of the court, at office, in the city of Jackson, on this, the 23rd day of June, 1904, and of the Independence of the United States the 128 year.

[Seal Supreme Court of Tennessee, Western Division, Jackson.]

JNO. W. BUFORD, Clerk.

Cost of transcript $56.00, paid by Randolph & Randolph, att'ys for James Foppiano July 6th 1904.

Endorsed on cover: File No. 19,427. Tennessee supreme court. Term No. 67. James Foppiano, plaintiff in error, *vs.* Robert A. Speed, as clerk of the county court of Shelby county. File No. 19,428. Term No. 68. James Foppiano, plaintiff in error, *vs.* Robert A. Speed, as clerk of the county court of Shelby county. Filed July 28th, 1904. File Nos. 19,427 and 19,428.

FILE COPY.

In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

JAMES FOPPIANO,

vs. No. [illegible]

ROBERT A. SPEED, AS CLERK OF THE COUNTY COURT OF SHELBY COUNTY,

AND

WRIT OF ERROR TO THE SUPREME COURT OF TENNESSEE.

JAMES FOPPIANO, *Plaintiff in Error,*

vs. No. [illegible]

ROBERT A. SPEED, AS CLERK OF THE COUNTY COURT OF SHELBY COUNTY, *Defendant in Error.*

STATEMENT OF CASE, ASSIGNMENT OF ERRORS AND BRIEF AND ARGUMENT FOR JAMES FOPPIANO, PLAINTIFF IN ERROR.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
Attorneys and Counsel for James Foppiano,
Plaintiff in Error.

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1905.

JAMES FOPPIANO, *Plaintiff in Error,*

vs. No. 67.

ROBERT A. SPEED, AS CLERK OF THE COUNTY COURT OF SHELBY COUNTY, *Defendant in Error,*

AND } WRIT OF ERROR

TO THE SUPREME COURT OF TENNESSEE.

JAMES FOPPIANO, *Plaintiff in Error,*

vs. No. 68.

ROBERT A. SPEED, AS CLERK OF THE COUNTY COURT OF SHELBY COUNTY, *Defendant in Error.*

STATEMENT OF CASE FOR PLAINTIFF IN ERROR, JAMES FOPPIANO.

The two cases make but one, and stand upon one record, and the differences between them will be stated below. They come up on agreed statements of facts, filed in the Circuit Court of Shelby County, with the right to appeal or sue out a writ of error reserved to each party, to any court having jurisdiction.

The State of Tennessee provided by statute "Persons selling beer or any quantity of liquors on steamboats, flatboats or any other vessel, or water craft, or from railroad cars, shall pay a tax each, in lieu of all other taxes, to be paid in any county they may elect, per annum $200.00." Acts of Tennessee, of the year 1903, Chapter 257, p. 615, Section 4. The same law had been in force since about the year 1899.

It was the duty of Speed, as Clerk of the County Court, to require all persons exercising taxable privileges, including the selling of beer and liquors, to take out licenses from his office and pay the tax therefor, and, upon failure, to issue a distress warrant against such person, having the effect of an execution against the property of the delinquent.

The West Memphis Packet Company had been a corporation of the State of Arkansas, duly created under its laws, and located at West Memphis, Crittenden County, Ark., opposite Memphis, on the Mississippi River, for fifteen years past or more. It had, by its charter, power to buy or build and own one or more steamboats and other water craft, to be used in transporting freight and passengers on the Mississippi River and its tributaries within the limits of the State of Arkansas.

During the time Foppiano was engaged in selling beer and liquors, the West Memphis Packet Company had been in the exercise of its corporate powers and privileges, engaged continuously in commerce on the Mississippi River between Memphis, Tenn., and points contiguous thereto, situated along the Arkansas shore of that river. For the fifteen years the West Memphis Packet Company had been operating a ferry across the Mississippi River from Hopefield, Crittenden County, Ark., and other points adjacent, in Arkansas, to and from the State of Tennessee, under licenses to operate such ferry regularly granted and issued to it by the County Court of Crittenden County, Arkansas, the tribunal authorized by the Constitution and laws of Arkansas to grant and issue such licenses. Under such licenses, the West Memphis Packet Company, during that time, had been making landings regularly at its dock at the wharf at Memphis, on the Mississippi River, and there receiving and discharging freight and pas-

sengers, transported or to be transported by means of such ferry along and across the Mississippi River. It made but one landing regularly in Tennessee and two or more in Arkansas.

For more than three years (being the years in controversy in this case) the West Memphis Packet Company had used and employed the steamboat "Chas. H. Organ" as its regular ferryboat in carrying on its ferry business, under its licenses, and such steamboat had made stated regular trips during all that time between Memphis, Tenn., and the points along the Mississippi River in Arkansas, constituting its ferry landings, and at the beginning of this suit was so engaged, and proposed to be continuously thereafter. The steamboat "Chas. H. Organ" was owned by the West Memphis Packet Company, and was duly enrolled and licensed as a steam vessel to navigate the Mississippi River and its tributaries, under the laws of the United States regulating the coasting trade, and for other purposes, in the Custom House at Memphis—Memphis being the nearest port of the United States to the residence of the West Memphis Packet Company, and the home port of the said steamboat.

For the fifteen years during which the West Memphis Packet Company had been keeping and maintaining its ferry across the Mississippi River, a bar had been, and was, at the beginning of this suit, kept and maintained on the steamboat it used and operated for that purpose by some individual to whom it rented the privilege of keeping such bar and carrying on at the bar the sale of beer and liquors by retail to persons transported or to be transported or upon its steamboat.

During the years 1901, 1902 and 1903 (the years in controversy here) Foppiano, the plaintiff in error, was the lessee of the West Memphis Packet Company, and rented the bar on the steamboat "Chas. H. Organ" from it, and at such bar, during the said three years, when the boat was in transit along or across the river, or when temporarily at the landings on one side or the other of the river, he made sales by retail of beer and liquors to persons transported or being transported, or to be transported, on such steamboat, or who were thereon and applied to make purchases. For those years Foppiano paid no tax on such business, and took out no

license therefor. Foppiano made no sales of beer or liquors on any steamboat or other vessel or water craft during those years, nor from any railroad cars or elsewhere, except only on the steamboat "Chas. H. Organ," and when engaged in such interstate commerce on the Mississippi River.

When this suit was begun Foppiano was the lessee, under a contract with the West Memphis Packet Company, up to July 1, 1904, of the bar on the steamboat "Chas. H. Organ," and had been carrying on, and was proposing to carry on, the business of selling beer and liquors at the bar on the steamboat in the same way as he had done for the past years.

Speed, as Clerk of the County Court, insisted that Foppiano was required to take out a license and pay a tax for such business so carried on, and Foppiano denied his liability, and insisted he was not required to take out any license or pay any tax under the law. In compliance with Speed's demand, and to save the issue of a distress warrant, Foppiano, unwillingly and under protest, as permitted by the statute (Shannon's Code, Section 1059, etc.), paid Speed, as Clerk of the County Court, $100.00 as the tax on the privilege of carrying on the business of selling beer and liquors at the bar of the steamboat "Chas. H. Organ" for six months from the 1st day of January, 1904, and $19.40, the costs charged for the issuance of such license, and Speed executed to him a receipt for all the money paid, and issued him a license to carry on the business on the steamboat for that time, and stated in the receipt he gave, and upon the license, that the sums had been paid under protest by Foppiano.

Speed then demanded of Foppiano that he pay the tax for the license for having carried on the business at the bar of the steamboat "Chas. H. Organ" for the three past years, namely, 1901, 1902 and 1903. Foppiano denied his liability to make such payment.

Speed claimed the right to back-assess Foppiano under the statute of the State of Tennessee for the three years, and demanded that Foppiano pay him $200.00 for each of the three years, and, in addition, take out a license to carry on the business for each year, and pay the Clerk's fees for issuing

the license for each year and for taking a bond and countersigning the license for each year, amounting to $4.00, and also pay the fees or costs charged by Greer, revenue agent, on the taxes for each year, amounting each year to $30.00, and making a total amount for each year of $234.00, or an aggregate for the three years of $702.00. No demand had been made by Speed, as Clerk, for the taxes claimed to be due, but on the 18th of November, 1903, Greer, as revenue agent, had given Foppiano a notice that his State and county licenses for exercising the privilege of carrying on the business of retailing liquors on steamboats was required to be taken out, and a tax paid therefor.

Foppiano was then cited, at the instance of Greer, revenue agent, to appear before Speed, as Clerk, to be back-assessed for each of the three years. Foppiano appeared under the notice and resisted the application.

Speed, as Clerk, decided he was taxable, and that the sums demanded should be paid and the licenses taken out. Foppiano then appealed from the decision to the State Board of Equalization, and the State Board of Equalization decided against him and affirmed the finding and order of Speed, as Clerk. Foppiano, thereupon, in compliance with Speed's demand, as Clerk, and under the decisions made, and for fear of a distress warrant, paid Speed, as Clerk, the sums demanded; that is, for taxes and costs and charges for each of the years 1901, 1902 and 1903, respectively, $234.00, all the sums aggregating $702.00. He paid the sums demanded unwillingly and under protest (Shannon's Code, Section 1059, etc), denying that he ought to be compelled to do so. Speed executed him receipts for all the sums demanded for each year, and issued him a license, purporting to authorize him to carry on the business on the steamboat "Chas. H. Organ" for each year, and stated in each receipt and license given that the money had been paid by Foppiano under protest.

The facts in each case were agreed on, under the statute of Tennessee (Shannon's Code, Section 5206), in order to enable the court to decide the controversy, subject to the right of either party to take the case by appeal, in the nature of a writ of error, or a writ of error, to the Supreme Court of Tennessee or other court having jurisdiction.

The ageeed statement of facts, as made, was filed in each case, along with the proper affidavit and cost bond, in the Circuit Court of Shelby County, the court of original jurisdiction. Record, pages 1-14.

At the same time a case was presented by Leslie L. Harrell similar to the first case presented by Foppiano, the difference being that Harrell had a bar on the "C. H. Hugo," a different steamboat, belonging to the West Memphis Ferry Company, a different corporation. The boat, however, was duly enrolled and licensed under the Act of Congress, and the West Memphis Ferry Company, a corporation of Arkansas, had the same powers under its charter as those possessed by the West Memphis Packet Company, and engaged in transporting freight and passengers by the steamboat as a ferryboat across the Mississippi River between Tennessee and Arkansas. Harrell's case was determined along with the two cases of Foppiano, but is not now before the court here. It remains below to abide the result of Foppiano's cases.

The two cases of Foppiano were heard in the Circuit Court on the agreed statements of facts. The court determined that Foppiano was not entitled to recover from Speed, as Clerk, any sum, and gave judgments against him for the costs of each case. Foppiano thereupon appealed each case in error from the Circuit Court of Shelby County to the Supreme Court of Tennessee. Record, pages 5 and 12.

The causes, on appeal, were consolidated and regularly heard in the Supreme Court of Tennessee, and on the 13th day of June, 1904, the court pronounced judgment in each case, affirming the judgment of the Circuit Court of Shelby County.

The case of Harrell was heard along with Foppiano's cases, and the opinion delivered on the questions presented here was entitled in that case. Record, pp. 60-64. But the court ordered that that opinion be made the opinion of the court in Foppiano's cases, along with the separate opinion delivered by another judge in Foppiano's cases. Record, pp. 65-67, and pp. 57-59.

A writ of error was then sued out and duly allowed, and a proper bond for the writ of error given and approved, and

the citation issued and served, and the cases are regularly here, with the transcript of the record, for hearing upon the writ of error.

Record, pages 67-74.

In the Supreme Court of Tennessee it was assigned by Foppiano for error, among other things, that the steamboat "Chas. H. Organ," duly enrolled and licensed for the coasting trade under the Acts of Congress, and Foppiano, on board that boat, respectively, when Foppiano kept the bar and sold the beer and liquors from the bar, in the course of the voyages of the steamboat along or upon the Mississippi River, and when landed on one side or the other of the river, in the course of such voyages, were outside of the jurisdiction of the State of Tennessee for the purposes of license and taxation, and not subject to be licensed or taxed by the State for the business carried on by them respectively. Record, p. 21.

The assignment was made more specific by references to the Constitution of Tennessee of the years 1796, 1834 and 1870, each containing the provision "That an equal participation in the free navigation of the Mississippi is one of the inherent rights of the citizens of this State. It cannot, therefore, be conceded to any prince, potentate, power, person or persons whatsoever," and to the cession by North Carolina of the country now constituting the State of Tennessee to the United States, by the Act of 1789, with the condition that the territory ceded should be laid out and formed into a State or States, and that the inhabitants should forever enjoy all the privileges, benefits and advantages set forth in the Ordinance of Congress of the year 1787 for the government of the Northwest Territory, among which was the right to the free use forever of all the navigable waters in the territory as common highways, without any tax, impost or duty therefor, and the acceptance by Congress of that cession by the Act of the 2d of April, 1790, and the subsequent admission of Tennessee as a State of the Union under the Constitution of 1796. Record, pages 22-24.

In this connection it was contended that as Tennessee claimed for its citizens and inhabitants the free use of the Mississippi River, without any license or tax from any author-

ity whatsoever therefor, it must, therefore, concede to the inhabitants or citizens of the State of Arkansas the same right, to be enjoyed in the same way. The treaty between the French Republic and the United States, of 1803, ceding the Louisiana Territory to the United States, was also referred to.

The assignment was further particularized by the contention that the steamboat "Chas. H. Organ," duly enrolled and licensed under the Acts of Congress regulating the coasting trade, and belonging to the West Memphis Packet Company, a corporation of the State of Arkansas, duly created under its laws, and having power under its charter to own steamboats and to navigate the Mississippi River, and actually engaged with the "Chas. H. Organ" in the navigation thereof, and in interstate commerce between the State of Tennessee and the State of Arkansas, during all the time Foppiano was on board and selling liquors and beer at the bar, that both the steamboat and Foppiano were outside the State of Tennessee, or, rather, outside its jurisdiction for the purposes of license and taxation. Record, pp. 25-30.

It was further assigned as error in the Supreme Court of Tennessee by Foppiano that the attempt to license and tax him for keeping the bar, and selling the beer and liquors therefrom, on the steamboat "Chas. H. Organ," duly enrolled and licensed for the coasting trade under the Acts of Congress, were unauthorized and unlawful, because they were attempts to interfere with and regulate commerce between the State of Arkansas and the State of Tennessee, and in conflict with the Constitution of the United States, and that the statutes undertaking to do so were therefore void.

It was further assigned as error that by the Constitution and laws of the State of Tennessee, Foppiano was not liable to take out license or to pay the sums demanded for taxes, costs or charges. Record, pp. 21, 50-51.

In its opinion on the question presented here, the Supreme Court of Tennessee stated that the steamboat used in carrying on the business of transporting freight and passengers by the West Memphis Packet Company could be taxed at its home port in the State of Arkansas, and that the State of Tennessee could neither impose a tax on the capital stock

of the packet company, incorporated by the State of Arkansas, nor upon its boat engaged in interstate commerce, making, as it did, only temporary landings at the wharf at Memphis. Record, p. 60.

But the court said the question was whether or not the exaction of a privilege tax from Foppiano, running a bar on the boat, while at its landing within the jurisdiction of Tennessee, was prevented by the principle stated. Record, p. 61.

The court said further in its opinion that the agreed statement of facts did not show that the charter of the West Memphis Packet Company conferred the right to maintain a bar, or rent the privilege of doing so to another, and that the court could not see that the exercise of such a privilege formed an essential part of the business which the West Memphis Packet Company was authorized to do. Record, p. 61.

The court said also that Foppiano might have bought the liquors and beer in Tennessee, and that it could see no reason why, in retailing, he should stand on any higher ground than the seller of drinks over the bar of any saloon in the City of Memphis. Record, p. 61.

The court then said finally: "But we do not deem it necessary to place this case on narrow or technical grounds, as we think the judgment of the trial court can be rested on the broader ground that the imposition of the tax or license fee was distinctly within the police power of the State." Record, 61. The rest of the opinion is devoted to an argument of that question.

The court conceded that the cases of Bowman vs. The Chicago & Northwestern Railway Company, 125 U. S., 465, and Leisy vs. Hardin, 135 U. S., 100, taken together, have substantially overruled the opinion of Chief Justice Taney in the License Cases, 5 Howard, 504 (Record, pp. 61-62), but referred to the Act of Congress of the 29th of August, 1890 (26 U. S. Statutes at Large, Chap. 728, p. 313), usually known as the Wilson Act, and to Wilkerson vs. Rahrer, 140 U. S., 561, and to Rhodes vs. Iowa, 170 U. S., 412, and Vance vs. Vandercook, 170 U. S., 438, and then said: "So it is the

importer of intoxicants whose packages have reached such terminus, and the retailer now stand on the same ground, and are equally under the strong and restraining hand of the several States." In reply to the argument for Foppiano that the Wilson Act was not intended to interfere with interstate commerce in liquors and beer, but was confined to the disposition of them in a State or Territory after they had become mingled with the mass of taxable property there, the court said that if the contention was right, the legislation was idle, as it had never been a matter of doubt that the State had the absolute right to control by taxation or otherwise "either intoxicants or any other character of property, when once incorporated with the general mass of property within the State." Record, p. 63.

Although the agreed statement of facts is that Foppiano has made sales of liquor and beer on the steamboat "Chas. H. Organ" only when the boat, as a ferryboat, or engaged in interstate commerce, was in transit along or across the river, or was temporarily at the landings on one side or the other of the river (Record, pp. 3 and 11), and has made no sales elsewhere, the Supreme Court of Tennessee seems to hold that every time the "Chas. H. Organ" was at the landing at Memphis, the liquors and beer he had for sale became and were incorporated with the property locally in the State of Tennessee, and that Foppiano being there, though on the steamboat, and engaged only in interstate commerce on the boat, while navigating the Mississippi, or incidentally at the landings while doing so, was also locally there, and his business was within the State for the purposes of a license and taxation.

ASSIGNMENT OF ERRORS BY FOPPIANO, PLAINTIFF IN ERROR.

I.

James Foppiano, while engaged in selling liquors and beer on the steamboat "Chas. H. Organ," which was then navigating the Mississippi River continuously and exclusively, was not subject to any license, or to taxation by the State of Tennessee for doing so. He was only using the Mississippi River, and was entitled by the Constitution and laws and treaties of the United States, and the compacts between the United States and the several States fronting the Mississippi River, including North Carolina, Tennessee and Arkansas, and the laws and treaties existing in the Louisiana Territory, and in the Southwest Territory, when Tennessee became a State, and when Arkansas became a State, and always since then, to the free use of the said river, without the payment of any tax, duty, impost or toll therefor. The Supreme Court of Tennessee should have given judgment accordingly, and that the licenses were unlawfully required, and the taxes unlawfully collected, and in favor of Foppiano for the sums of money sued for by him, and in not doing so, erred.

II.

Foppiano sold liquors and beer only on the steamboat "Chas. H. Organ." It was duly enrolled and licensed under the laws of the United States for the coasting trade, and was then actually engaged in the navigation of the Mississippi River, a public navigable water of the United States. It was

owned and employed by the West Memphis Packet Company, a corporation of the State of Arkansas, having its situs at West Memphis, Ark. The "Chas. H. Organ" was used as a ferry boat, and in carrying on interstate commerce between the State of Arkansas and the State of Tennessee, by the West Memphis Packet Company, and not otherwise. It was only at the landing in the State of Tennessee, or within the jurisdiction of the State of Tennessee, when and while engaged in such ferry and interstate commerce business. So Foppiano was never within the State of Tennessee while selling beer and liquors, or within its jurisdiction, for the purposes of license and taxation, and was not liable to take out any license or pay any tax to the State of Tennessee. The said Supreme Court should have given judgment accordingly, and for Foppiano for the sums of money sued for, and, in not doing so, it erred.

III.

The State of Tennessee, in licensing and taxing Foppiano for selling beer and liquors on the steamboat "Chas. H. Organ," by the Statutes it has enacted, and through Speed, as Clerk of the County Court, and in requiring and compelling Foppiano to take out the licenses and pay the taxes, as shown in the record, when the steamboat was duly enrolled and licensed under the laws of the United States for the coasting trade, and was engaged in the navigation of theMississippi River, a public navigable water of the United States, and was owned by the West Memphis Packet Company, a corporation of the State of Arkansas, which was actually engaged in operating a ferry, and in carrying on interstate commerce between the State of Arkansas and the State of Tennessee by means of the said steamboat, has undertaken to regulate commerce upon the Mississippi River, and between the State of Arkansas and the State of Tennessee, and such legislation and action were in violation of the Constitution of the United States, and of the exclusive power of Congress under the Constitution to regulate interstate commerce, and, therefore, void. The said Supreme Court should have given judgment accordingly, and in favor of Foppiano for the sums of money sued for, and in not doing so, erred.

IV.

The Constitution of the State of Tennessee, which provides that an equal participation in the free navigation of the Mississippi is one of the inherent rights of the citizens of Tennessee, and cannot be conceded to any prince, potentate, power, person or persons whatever, and the Statute of the State which provides that persons engaged in interstate commerce shall not be punishable for selling beer or liquors on steamboats, flatboats or other vessels or water craft, engaged in interstate commerce, without first paying the tax prescribed, have excepted and exempted Foppiano from liability to take out the licenses or pay the taxes, which he has been compelled to take out and to pay for, as appears in this Record, and the said Supreme Court should have given judgment accordingly, and in favor of Foppiano for the sums of money sued for, and in not doing so, it erred, and by its judgment it has made the State of Tennessee deprive Foppiano of a privilege and immunity secured to its own citizens, and has abridged his privileges and immunities as a citizen of the United States, and has deprived him of his liberty and property without due process of law, and has denied to him the equal protection of its laws, and thus has violated the Constitution of the United States.

WHEREFORE, for the said errors and others apparent on the face of the Record, the said plaintiffs in error pray that the said judgments of the said Supreme Court in the said consolidated causes may be reversed and set aside, and the proper judgments rendered, or directed to be rendered.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,

Attorneys and of Counsel for Plaintiff in Error.

James Foppiano, while on board the steamboat "Chas. H. Organ," navigating the Mississippi River between the State of Arkansas and the State of Tennessee, engaged in selling beer and liquors, was outside the jurisdiction of the State of Tennessee for the purposes of license and taxation, and was exempt from license and taxation by the State of Tennessee under the Constitution, treaties and laws of the United States.

I.

Prior to the war of 1756 between Great Britain and her colonies on one side and France and her colonies on the other, the Mississippi River was claimed by Great Britain and her colonies, and particularly by North Carolina, to be the boundary between the British possessions on the east of that river and the French possessions on the west. While this claim was disputed by France before that time and subsequently, after Louisiana had been ceded by France to Spain and Great Britain had acknowledged the independence of the United States, was disputed by Spain, in the light of what has transpired since, it must be recognized that the river in the vicinity of Memphis was, in fact, before that time, as well as afterwards, the national boundary between the two sovereignties. (Pollard vs. Hagan, 3 Howard, 225-229.) Neither one ever recognized that the other was the first to occupy or appropriate the river, and each one claimed that its own occupancy and appropriation was prior in time to the other. Under this state of facts the rule laid down by Vattel in these words, applied: "If neither the one nor the other of two nations near the river can prove that it settled first in those countries, it is to be supposed that they both came there at the same time, since neither of them can give any reason of preference; and, in this case, the dominion of each will be extended to the middle of the river." Vattel, Book I, Chap. 22, Section 266, paragraph 3, pp. 179-180. Handley vs. Anthony, 5 Wheaton, 379. (And see 1 Phillimore's International Law, Ch. 5, pp. 170-171, No. 161.)

By the treaty of Paris of the 16th of February, 1763, which terminated the war of 1756, France ceded to Great Britain all that portion of what was then and afterwards called Louisiana, lying east of the Mississippi River from its source to Bayou Manchac or Iberville, retaining the land on both sides of the river below Bayou Manchac, and retaining the west side of the river above that point, the irrevocable line of division between the two, as the treaty declared, to be an imaginary line along the middle of the Mississippi River, from its source to Bayou Manchac, or Iberville. Thus Great Britain, by the treaty, acquired dominion and virtual possession of all North America east of the Mississippi and north of the south boundary at Bayou Manchac. (1 Monette's "Valley of the Mississippi," Book 2, Chapter 10, page 306.) This treaty provided in words that the navigation of the river from its source to its mouth was to remain forever free to the subjects of both powers.

By a secret treaty already entered into (November 3, 1762), France had agreed to cede to Spain the residue of Louisiana, embracing not only what it retained on the east side of that river, but all the territory on the west side to its remotest tributaries; and subsequently Spain formally assumed possession of Western Louisiana, so that by the year 1769 its authority and jurisdiction were extended and recognized through all the vast region, then unknown, west of the Mississippi River from its sources to the Gulf of Mexico, and extending westward to its tributaries among the Rocky Mountains. (1 Monette's "Valley of the Mississippi," Book 4, Chapter 1, page 441, etc., and Book 2, Chapter 10, page 306, etc.)

The provisional treaty of 20th of November, 1782, and the definite treaty of September 3, 1783, between the United States and Great Britain, which terminated the Revolutionary War, established the Mississippi River, from the 31st parallel of north latitude, North, as the limit on the west of the territory of the United States. The preliminary treaty of January 20, 1783, between France, Spain and Great Britain, recognized the Spanish title to the whole of East and West Florida and the Island of New Orleans, and this treaty was ratified and given effect by the permanent treaty of September 3, 1783, between France, Great Britain and the United States.

Thus France or Spain was left the sovereign, and in possession of both banks of the Mississippi River south of the 31st degree, north latitude, and also of the west bank of that river northward to its sources.

Each, the provisional treaty of November 20, 1782, and the definite treaty of September 3, 1783, between the United States and Great Britain, contained this provision: "The navigation of the river Mississippi, from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States." 8th U. S. Statutes at Large (Foreign Treaties), p. 57, art. 8, and p. 83, art. 8.

Before the end of the Revolutionary War the people of the American colonies had penetrated the western wilderness and made settlements, particularly along the tributaries of the Mississippi River, and had commenced the use of the rivers for the purposes of navigation and commerce.

The settlements grew in number and importance and the population increased until, at the treaty of peace in 1783 there was a large number of people, comparatively, settled along those rivers and navigating them, in the style of those days, and there was considerable commerce.

Spain disputed the right of the people of the Western Territory to navigate the Mississippi River or its tributaries, or to carry on commerce upon them. It claimed the right to derive a large revenue upon the Mississippi River from the trade carried on, by the imposition of transit and port duties, besides harbor duties and such other expenses as were unavoidable in trade. A revenue officer, with a guard, and a military post were established at New Madrid and at other points, at which all boats were required to land and comply with the revenue laws, which were enforced with rigor, even to seizure and confiscation of the cargo.

It established posts and garrisons on the east side of the Mississippi River as far north as Memphis. 1 Monette's "Valley of the Mississippi," Book 4, ch. 3, p. 508.) And Mr. Jefferson, while Secretary of State, in his report to the President of the 18th of March, 1792, as to instructions to be given

to the Commissioners to negotiate a treaty with Spain, stated that Spain had taken possession and fortified a new post on the Walnut Hills, above the mouth of the Yazoo River, and far above the 31st degree of north latitude. (Writings of Thos. Jefferson (Library Edition), Vol. 3, p. 198.)

Monette says: "The Western people were multiplying rapidly, and their surplus products, adapted to the Louisiana trade, continued to increase astonishingly and force their way down the Mississippi. The river duties, which by them were deemed oppressive and unjust, were collected and extorted by the officials of Louisiana, supported by military force. The Western people believed these duties exorbitant, and the many restrictions which were imposed oppressive and unjust towards those who possessed a natural right to navigate the river free of all such impositions. Under these impressions it is not strange that many of the sturdy republicans should resist these exactions and disregard the attempts of the Spanish authorities to enforce them. In this maner it frequently happened that persons were seized, fined and imprisoned, with vexatious delays and expenses, and sometimes their cargoes were confiscated as contraband or forfeited, and the owners, or supercargoes, were discharged, penniless, to find their way home. Repeated occurrences of this kind in the lapse of two years, from 1785 to 1787, had greatly incensed the Western people and disseminated a general feeling of revenge throughout the whole Ohio region, from the sources of the Monongahela to those of the Tennessee and Cumberland Rivers. To such an extent had this vindictive feeling been carried in Kentucky and upon the Cumberland River that a military invasion of Louisiana was devised for redressing the wrongs of the Western people, and seizing the port of New Orleans, provided the Federal government failed to obtain from Spain by negotiations such commereial privileges in Louisiana as were indispensable to the prosperity of the Western people. Such had been the excitement in Kentucky and Tennessee as early as the spring of 1787, that the Spanish governor became seriously apprehensive of an invasion from Kentucky in defiance of the Federal authority. At the same time the Western people, indignant at the neglect of the Federal government in not securing for them the free use of the Mississippi, were strongly tempted to separate from the Atlantic

States and secure for themselves an independent form of government, which would enable them to obtain from Spain, under one form or another, those commercial advantages which they were determined to possess." (1 Monette's "Valley of the Mississippi," Book 4, chap. 2, pp. 470-471. And see Haywood's "History of Tennessee," chap. 1, p. 20, etc., and chap. 5, p. 144, etc., chap. 9, pp. 431-432 and 434-445.)

At the instigation of an emissary from France, then at war with Spain, whose object was to release the French residing there from the thraldom of Spanish dominion in Louisiana, the Western people, and particularly those of Kentucky and Tennessee, were seduced, in view of the incalculable advantages which they were made to believe would accrue to the whole country by a separation from the Federal Union, seriously to contemplate such a separation, and an alliance with Louisiana, under the protection of France, and troops were actually embodied with that view upon the southern frontier of Georgia, about the year 1793. (1 Monette's "Valley of the Mississippi," Book 4, chap. 2, p. 483.)

Monette says further: "It was about the close of the year 1786 that the rumor obtained currency in the West that the Federal government, regardless of the interests of the Western people, was about to conclude a treaty with the Spanish minister, by which the United States was to abandon their claim to the free navigation of the Mississippi for twenty years to conciliate the good-will of Spain. The very possibility of abandoning their rightful claims produced the highest degree of excitement in all the Western settlements, which not only endangered the safety of Louisiana, but caused great anxiety to the Federal government itself for several years subsequently. The indignation of the Western people had been fully aroused, and they had determined no longer to submit to the vacillating negotiations of the Federal government, which could for a moment hesitate to urge the immediate recognition of their rights. The feelings of indignation were expended in a determination to plan a military invasion of Louisiana, which should compel Spain to concede their demands without delay." (1 Monette's "Valley of the Mississippi," Book 4, chap. 3, pp. 498-499.)

The Spanish authorities made concessions to satisfy the Western people, but many of the people of Kentucky and

Tennessee, though satisfied with the Spanish authorities and pleased with the commercial privileges extended, were unwilling to submit to the species of vassalage implied by the manner in which the river commerce was enjoyed. They claimed all these advantages, not as special favors, but as common and indefeasible rights. (1 Monette's "Valley of the Mississippi," Book 4, chap. 3, pp. 500-501.)

Congress, under the Confederation, in the year 1787, directed its Secretary of Foreign Affairs to open negotiations with Spain through its minister resident in the United States, and to impress upon his serious attention the danger of the interruption of the good understanding between the two countries, and also instructed the Secretary expressly to stipulate both for the territory of the United States, as fixed by the treaty of 1783, and the free navigation of the Mississippi from its source to its mouth. (1 Monette's "Valley of the Mississippi," Book 4, chap. 3, p. 502.

The population upon all the great tributaries of the Ohio next to the mountains had greatly multiplied, and the augmented agricultural products demanded an outlet adequate to the supply. On the east, commerce and export were entirely cut off by the mountains; on the west, the great branches of the Ohio gave direct and easy transportation from their doors to the Mississippi, and by that river to every part of the habitable globe. In fact, the Mississippi was the natural outlet for the whole West, and yet it was held and controlled by a power which claimed exclusive navigation upon it, because it held possession of the mouth. In consequence of these facts, many of the people lost their patience and censured the tardiness of the Federal government and its want of energy. (1 Monette's "Valley of the Mississippi," Book 4, chap. 3, pp. 502-503.)

But the Federal government had not been neglectful of their interests. In the month of September, 1788, Congress declared "that the free navigation of the Mississippi is a clear and essential right of the United States, and that the same ought to be considered and supported as such." The President had kept up constant negotiations through the American minister at Madrid, with a view to obtaining the free use of the river through Louisiana to the sea.

He determined to maintain the rights of the Western people with the whole power of the Federal government, and assumed a firm and decided tone in urging upon Spain the necessity of a speedy adjustment of all the questions of boundary, commerce and the navigation of the Mississippi River, which were under negotiation. (1 Monette's "Valley of the Mississippi," Book 4, chap. 3, p. 511, etc.)

Under the date of March 18, 1792, Mr. Jefferson, then Secretary of State, furnished the President a report of instructions to the Commissioners to negotiate with Spain for a treaty with reference to the boundary, the navigation of the Mississippi River and commerce. In the course of that report he said: "Our right to navigate the river from its source to where our southern boundary strikes it is not questioned. It is from that point downward only that the exclusive navigation is claimed by Spain—that is to say, where she holds the country on both sides, to-wit: Louisiana on the west and West Florida on the east." (Writings of Thos. Jefferson (Library Edition), Vol. 3, p. 173.)

After referring to the treaty of 1763, and stating that by that treaty there was to be free navigation, and that vessels should not be stopped, visited or subjected to the payment of any duties whatsoever (Article 7), and referring to the treaty of November, 1782, between the United States and Great Britain, and the subsequent treaty of January, 1783, between Great Britain and Spain, by which Great Britain had conceded the right of Spain to the territory of Florida, Mr. Jefferson said that the right of the United States stood on a ground still broader and more unquestionable than the treaties, namely, the law of nature and of nations. After arguing the question, and saying it was essential to the interests of both parties that the navigation of the Mississippi River be free to both, on the footing on which it was defined by the treaty of Paris (1763), namely, through its whole breadth, and that the incidental right to use the shores was included, and stating supporting facts and reasons and objections that might be made by Spain to the concessions to be asked for, he said further, "but the decisive answer is that Spain does not grant us the navigation of the river. We have an inherent right to it." In prescribing conditions *sine qua non*, he said, (1) Our western boundary must remain established along the

middle channel of the Mississippi River, however that channel may vary, as it constantly is varying, and (2) that our right be acknowledged of navigating the Mississippi River in its whole breadth and length, from its source to the sea, as established by the treaty of 1763." He added: "That no phrase should be admitted in the treaty which could express or imply that we take the navigation of the Mississippi as a *grant* from Spain." He said we had a claim on Spain for indemnification for nine years' exclusion from the navigation, and the reimbursement of the heavy duties, not less than 15 per cent. for the most part, on extravagant valuations levied on commodities which Spain had permitted to pass New Orleans. The treaty, he said, must not exceed twelve or fifteen years' duration, "except the clause relating to boundary and the navigation of the Mississippi, which must be perpetual and final."

His conclusion was: "Should the negotiations on the subject of navigation and boundary assume at any time an unhopeful aspect, it may be proper that Spain should be given to understand that if they are discontinued without coming to an agreement, the government of the United States cannot be responsible for the longer forbearance of our Western inhabitants." (Writings of Thos. Jefferson (Library Edition), Vol. 3, pp. 173-176, 187, 188-189, 194 and 197.)

The result of the negotiations was the treaty between the United States and Spain of the 20th of November, 1795, which covered the whole of the controversy. One of the stipulations was (Article 4) that the middle of the Mississippi River should be the western boundary of the United States from its source to the intersection of the 31st parallel of north latitude, which the treaty termed "the line of demarkation," and Spain stipulated that the whole width of the river, from its source to the sea, should be free to the people of the United States. (8th U. S. Statutes at Large (Foreign Treaties), p. 140.)

The ordinance of Congress for the government of the territory of the United States northwest of the Ohio River, enacted on the 13th day of July, 1787, after providing that

the territory, and States which might be formed therein, should forever remain a part of the Confederacy of the United States, subject to the Articles of Confederation, and to such alterations therein as should be constitutionally made, among other things declared as follows: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost or duty therefor." (See the Ordinance, 1st U. S. Statutes at Large, Note p. 52. And Haywood's History of Tennessee, Appendix, p. 493.)

In 1789 North Carolina, by an act of its Legislature, made the cession of the country now constituting the State of Tennessee, through a formal deed executed by Commissioners, to the United States, and Congress, by the act of April 2, 1790, signified its acceptance. (See 2 Haywood & Cobb's Statute Laws of the State of Tennessee (Knoxville, 1831), p. 7-11, and 1 U. S. Statutes at Large, p. 108, and Nicholson & Caruthers' Statute Laws of Tennessee, pp. 39-43.)

In the preamble to its act, the State of North Carolina first declared that the inhabitants of the said western territory were desirous that such cession should be made, in order to obtain a more ample protection than they had theretofore received. After providing for the deed making the cession, and prescribing other conditions, the act declared (4th) "That the territory so ceded shall be laid out and formed into a State or States, containing a suitable extent of territory, the inhabitants of which shall enjoy all the privileges, benefits and advantages set forth in the ordinance of the late Congress for the government of the Western Territory of the United States;" that is to say, when Congress should, in a prescribed manner, accept the cession under the express conditions thereby specified, and should "at the same time assume the government of the said territory ceded, which they should execute in a manner similar to that which they supported in the territory west of the Ohio, should protect the inhabitants against enemies, and should never bar or deprive them, or any of them, of privileges which the people in the territory west of the Ohio enjoyed."

The people of Tennessee formed their first constitution in 1796. In the preamble they stated they had the right of admission to the general government "as a member State thereof," consistent with the constitution of the United States, and the act of cession of North Carolina, recognizing the ordinance for the government of the territory of the United States northwest of the River Ohio. Under the constitution thus formed, Congress admitted the State of Tennessee by the act passed on the 1st day of June, 1796, "to be one of the United States of America, on an equal footing with the original States in all respects whatever." (1 Statutes at Large, United States, p. 491; Brightley's Digest of the Laws of the United States, p. 863.)

In the constitution thus formed, Article 11, Sec. 29, it was declared "that an equal participation in the free navigation of the Mississippi is one of the inherent rights of the citizens of this State. It cannot therefore be conceded to any prince, potentate, power, person or persons whatever." At the time this provision was made part of the constitution, Spain owned the territory across the Mississippi, immediately west of the State of Tennessee; but, notwithstanding the fact that the dominion of Spain over that territory ceased, and also that of France, and that of the United States attached, within less than ten years thereafter, the Constitution of Tennessee of 1834 (See Art. 1, Sec. 29), and the Constitution of 1870 (See Art. 1, Sec. 29), is in substantially the same language as that quoted from the constitution of 1796.

By the treaty of St. Ildefonso, of October 1, 1800, Spain ceded to France "the colony or province of Louisiana, as Spain possessed it, and as France had previously possessed it, and as Spain had it under the treaties with other States subsequent to the cession to it by France."

By the treaty of the 30th of April, 1803, between France and the United States, France ceded forever and in full sovereignty, to the United States "the colony or province of Louisiana, with the same extent that it then had in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into, between Spain and other States, with all its rights and appur-

tenances, as fully, and in the same manner as they had been acquired by the French Republic, in virtue of" the treaty of the 1st of October, 1800, with Spain.

The treaty provided (Art. 3), that the inhabitants of the ceded territory should be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and, in the meantime, they should be maintained and protected in the free enjoyment of their liberty, property, and the religion which they professed. (See U. S. Statutes at Large, Vol. 8 (Foreign Treaties), pp. 200-206.)

On the 3rd of March, 1803, before the treaty took effect, Congress enacted that all navigable rivers within the territory of the United States south of Tennessee should be deemed to be, and remain, public highways (2 U. S. Statutes at Large, p. 235), and by the act of March 31, 1811, Sec. 12, enacted that all the navigable rivers and waters in the territories of Orleans and Louisiana should be and forever remain public highways. (2 Statutes at Large, U. S., p. 666; Brightley's Digest of the Laws of the United States, p. 817.)

Sir Robert Phillimore says: "It is true, indeed, that the United States of America in their controversy with Spain with reference to the navigation of the Mississippi River, before the treaty of Lorenzo el Real in 1795, insisted upon a strict international right, founded, as it was alleged, upon the natural sentiments of man, to the free use of the river from the source to the mouth, to all the riparian inhabitants. But the practice of nations was not, at that time, in favor of this position, and a treaty was finally resorted to in this, as it has been since in other cases, as the only certain means of placing this claim upon the footing of right, and of securely regulating its exercise." (1 Phillimore on International Law, Chap. 5, p. 170.)

Mr. Wheaton says: "The right of the United States to participate with Spain in the navigation of the Mississippi was rested by the American government on the sentiment written in deep characters on the heart of man, that the ocean is free to all men, and its rivers to all their inhabitants. This

natural right was found to be universally acknowledged and protected in all tracts of country united under the same political society by laying the navigable rivers open to all their inhabitants." (Wheaton's International Law (Dana's Edition), Section 201.)

Applying what Chief Justice Marshall said in Foster vs. Neilson (2 Peters, 253), repeated by Justice McKinley in Pollard vs. Hagan (3 Howard, 228), after the government of the United States had induced Spain to agree to what it claimed, upon the principle it asserted, namely, that the Mississippi River was free to all men, it would be an anomaly if its courts should maintain the opposite theory, and, certainly, it would be an anomaly in the history and practice of nations. On this subject Chief Justice Marshall said: "If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country, of which it is in possession, and which it claims under a treaty—if the Legislature has acted on the construction thus asserted—it is not in its own courts that this construction is to be denied." (3 Howard, 228; Johnson vs. McIntosh, 8 Wheaton, 587-589, 591-592.)

By the Constitution the President had power, by and with the advice and consent of the Senate, to make treaties with the concurrence of two-thirds of the Senators, and the Constitution declared that all engagements entered into before its adoption should be as valid against the United States under the Constitution as under the Confederation; and, further, that all treaties made, or which should be made, under the authority of the United States, should be the supreme law of the land, and that the judges in every State should be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

The inhabitants of the Louisiana Territory lost nothing by the treaty of cession which they formerly possessed, and under the provisions of that treaty were entitled to be maintained and protected in the free enjoyment of their liberty, property and the religion they professed, until they should be incorporated in the Union of the United States according to

the principles of the Federal Constitution, and then they became entitled to the enjoyment of all the rights, advantages and immunities of citizens of the United States.

Leaving out of view, therefore, their right to the free use and enjoyment of the Mississippi River, under the law of nature and of nations, which certainly existed as to them, as well as to the inhabitants on the east side of the Mississippi River, before the treaty of cession, those inhabitants are now protected in the free use and enjoyment of that river, not only by the Constitution and laws of the United States, and the treaty of cession, but by the treaty of 1763 between Great Britain and France, and the treaties of 1782 and 1783 between the United States and Great Britain, and the treaty of 1795 between Spain and the United States.

In the American Insurance Co. vs. Canter (1 Peters, 542), Chief Justice Marshall said: "The Constitution confers absolutely on the government of the Union the power of making war and of making treaties; consequently, the government possesses the power of acquiring territory either by conquest or by treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it, and the law which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in full force until altered by the newly created power of the state."

In Delassus vs. the United States (9 Peters, 117), the treaty between the United States and France, and the rights acquired under it or preserved by it, were in question. In

that case Chief Justice Marshall said: "These are the stipulations which afford that protection or security to claims to land under the French or Spanish government, to which the act of Congress refers. They extend to all property until Louisiana shall become a member of the Union into which the inhabitants are to be incorporated as soon as possible, and admitted to all the rights, advantages and immunities of citizens of the United States. That the perfect inviolability and security of property is among these rights, all will assert and maintain. The right of property then is protected and secured by the treaty, and no principle is better settled in this country than that an inchoate title to lands is property. Independent of every stipulation, this right would be held sacred. The sovereign who acquires an inhabited territory, acquires full dominion over it, but this dominion is never supposed to divest the vested rights of individuals to property. The language of the treaty ceding Louisiana excludes every idea of interfering with private property—of transferring lands which had been severed from the royal dominion. The people change their sovereign. Their right to property remains unaffected by this change." (9 Peters, 133.)

Baldwin, Justice, in Mitchell vs. The United States (9 Peters, 734), in stating the results of former adjudications, stated among them: "That by the law of nations the inhabitants, citizens or subjects of a conquered or ceded territory or province, retain all the rights of property, which have not been taken from them by the orders of the conquerer or the laws of the sovereign who acquires it by cession, and remain under the former laws until they shall be changed."

In Soulard vs. The United States (4 Peters, 511), Chief Justice Marshall said: "In the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred though it had not been inserted in the contract. The term "property" as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract—those which are executory—as well as those which are executed. In

this respect the relations of the inhabitants to their government is not changed. The new government takes the place of that which has passed away." (4 Peters, 512.)

The rights of individuals, as well as those of nations, acquired under treaties, are as substantial and as permanent, and entitled to the same protection, as rights acquired in any other lawful way; and the inhabitants of the Louisiana Territory can now appeal to the treaty between France and the United States, and what existed when the treaty was ratified, for the protection of the rights they then possessed, and possess now, as fully as they can to the Constitution of the United States, and the several acts of Congress which have been passed, and the compacts or contracts made between the United States and the several States, when admitting such States into the Union.

In Chirac vs. Chirac (2 Wheaton, 259), Chief Justice Marshall said (referring to the treaty between the United States and France of 1778, which had been repealed or superseded). "An attempt has been made to avoid the effect of this claim in the act by contending that it was passed for the sole purpose of enforcing the treaty, and was repealed by implication when the treaty was repealed. The court does not think so. The enactment of the law is positive, and its terms perpetual. Its provisions are not made dependent on the treaty; and, although the peculiar state of things then existing might constitute the principal motive for the law, the act remains in force from its words, however that state of things may change." (2 Wheaton, 272.)

In a subsequent part of the opinion, after stating that the treaty in question had been limited to eight years, which had expired, the Chief Justice said, further: "How does this circumstance affect the case? The treaty was framed with a view of being perpetual. Consequently, its language is adapted to the state of things contemplated by the parties, and no provision could be made for the event of its expiring within a certain number of years. The court must decide on the effect of this added article in the case which has occurred. It will be admitted that a right once vested does not require for its preservation the continued existence of the power by which it was acquired. If a treaty or any other law has performed

its office by giving a right, the expiration of the treaty or law cannot extinguish the right." (2 Wheaton, 277.)

In the Society for the Propagation of the Gospel vs. New Haven (8 Wheaton, 464), Justice Washington said: "If real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguishes the right to such estate. *In truth, it no* more affects such rights than the repeal of a municipal law affects the rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed that rights of property already vested during its existence were gone by such repeal. Such a construction would overturn the best established doctrines of law and sap the very foundation on which property rests." (8 Wheaton, 493-494.) The Justice then denied, as a matter of law, that even war between the contracting states extinguishes all the provisions of a treaty. He said: "We think, therefore, that treaties, stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the caes of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts, and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace." (8 Wheaton, 494-495.)

The same proposition of law is in substance stated in the opinion of Baldwin, Justice, in Mitchell vs. The United States (9 Peters, 711). He said (referring to the King of Spain, then owning Florida): "By thus holding treaties with these Indians, accepting of cessions from them, with reservations, and establishing boundaries with them, the King waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve, and that the boundaries of his territorial and proprietary rights should be such, and such only, as was stipulated by these treaties. This brings into practical operation another principle of law, settled and declared in Campbell vs. Hall (Cowper, 213), that the proclamation of 1763, which was the law of the provinces ceded by the treaty of 1763, was binding on the King himself, and that a right or exemption once granted by one proclamation could not be

annulled by a subsequent. It cannot be necessary to inquire whether rights secured by a treaty approved by the King are less than sacred under his voluntary proclamation." (9 Peters, 749; and see United States vs. Rauscher, 119 U. S., 417, etc.)

After copying the act of Congress of 1798, absolving the United States from the stipulations of all treaties with France (1 Statutes at Large, U. S., Chap. 67, p. 578), Justice Field, in the Chinese Exclusion Case, said: "This act, as seen, applied in terms only to the future. Of course, whatever of a permanent character had been executed or vested under the treaties was not affected by it. In that respect the abrogation of the obligations of a treaty operates like the repeal of a law, only upon the future, leaving transactions executed under it to stand unaffected." (130 U. S., 601-602.)

In O'Fallon vs. Daggett, 4 Missouri, 343 (1836), it was decided that the banks of navigable rivers in the State of Missouri are public highways, and though owned by private individuals, fishermen and navigators are entitled to a temporary use of them in landing, fastening and repairing their vessels, and exposing their sails and merchandise.

In that case, Spain had granted land in the Territory of Louisiana, located in the State of Missouri, to the water's edge of the Mississippi River. In its opinion the court said: "This grant must be interpreted, understood, limited and restrained according to the laws of the country in force at the time when the grant was made. By reference to that portion of the Partidas before cited (See 1 Partidas, Moreau & Carlton's Edition, New Orleans, 1820, p. 337, Law 6), it will be seen that rivers, ports and public roads belong to all men in common, so that strangers coming from foreign countries may make use of them in the same manner as the inhabitants of the place where they are might do, and though the dominion or property of banks of rivers belongs to the owner of the adjoining estate, nevertheless, every man may make use of them to fasten his vessel to the trees that grow thereon, or to refit his vessels or to put his sails or merchandise there. So fishermen may put and expose their fish for sale there, and dry their nets, or make use of the banks for all like purposes, which appertain to the art or trade by which they live." And see Tiede-

man's Real Property, Sec. 835; 1 Domat's Civil Law, 280; 3 Kent's Commentaries, pp. 425-426; Code Napoleon, Nos. 538 and 650.

By the law existing there when the Louisiana Territory was acquired, public property was incapable of alienation, and the law remained the same in Louisiana after it was admitted as a State.

Mayor vs. Magnon, 4 Martin (La.), 81, Mr. Farnham says that by the civil law the public use of the banks of a river was part of the law of nations, just as that of the river itself. All persons were at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and place part of their cargo there. In Louisiana now the public has a right of way along the banks of all navigable rivers, and the right to use them for any purpose connected with the navigation of the stream. (1 Farnham on Waters, Sec. 143a; Hanson vs. City Council of Lafayette, 18 Louisiana, 295.)

The principle that the King of Spain could not grant the soil of a navigable water as private property, has in substance been decided in the case of New Orleans vs. The United States, 10 Peters, 662. Public quays along the Mississippi River at New Orleans and the accretions which had been made were in controversy in that case. It was claimed on one side in that controversy that the land had been permanently dedicated to the public use, during the respective dominions of Spain and France in the Louisiana Territory, and that it had not been acquired, and was not subject to grant by the United States as private property. It was claimed on the other side, that the United States had acquired the title to the land under the treaty with France of the 30th of April, 1803, ceding the Louisiana Territory to the United States, and that the United States had the power to make a grant of it as of other lands passing under the treaty. The court held that the United States, under the treaty, acquired no title to the property which it could grant, and that the title remained in the public for the purposes of the dedication. (10 Peters, 736-737.)

If the title to the bed of a public navigable river and the title to its shores, or banks, dedicated for the use of the public,

cannot pass by a treaty, or by a grant of the sovereign of the territory, it is difficult to understand how it can be claimed that the inherent right, or the right which rests on the law of nature and of nations, to the free use of the Mississippi River, and its tributaries, possessed by its inhabitants, exempt from taxation, which antedated all the treaties and all the grants, could be extinguished by the treaty between France and the United States, of the 30th of April, 1803, or ceased to exist when the States bordering the Mississippi River were afterwards organized with republican forms of government and admitted into the Union of the United States as members.

In Martin vs. Waddell (16 Peters, 410), the court said: "When the Revolution took place, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government."

And in McCready vs. Virginia (94 U. S., 394), the court, referring to Martin vs. Waddell, and other cases, and stating the principle as settled that each State owns the beds of all tidewaters within its jurisdiction, unless they have been granted away, said, further: "In like manner the States own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people and *the ownership is that of the people in their sovereign capacity.*"

Why is not the same true as to the use of the Mississippi River and the other navigable waters in the Louisiana Territory? Why have not the States, respectively formed out of that territory, in like manner, become possessed of that river and those waters, in their representative capacities, just as the United States was before the acquisition, for the common use of their inhabitants, and free to them, and to all the citizens of the United States, without any tax, duty, impost or toll to be imposed therefor by any State?

In McCready vs. Virginia it was decided that the right which the citizens of a State have acquired to the common use of the beds of the tidewaters within the State is not a mere privilege or immunity of citizenship, *but is a property right.*

The same must be true of the right to use the Mississippi River and its tributaries, held by the inhabitants of each State, subject always to the paramount right of navigation.

In McCready vs. Virginia, Chief Justice Waite, recognizing the paramount right of navigation, and speaking of the prohibition by Virginia of the use of the oyster fisheries in the Ware River, where the tide ebbs and flows, to the citizens of other States, said: "Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire, comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship." (94 U. S., 395.)

In Smith vs. Maryland, 18 Howard, 71, the court held that while the soil below low water mark in the Chesapeake Bay, in the State of Maryland, belongs to the State, where not granted by the sovereign power before the Declaration of Independence, that the State holds such soil not only subject to, but in some sense in trust for the enjoyment of certain public rights, including the common liberty of taking fish, as well shell fish as floating fish, and has the duty upon it to preserve unimpaired those public uses for which the soil is held. (18 Howard, 75.)

In the United States vs. Percheman (7 Peters, 51), the effect of the cession of Florida to the United States by Spain, under the treaty of the 22d of February, 1819 (8 U. S. Statutes at Large (Foreign Treaties), p. 252), was involved. The language of the treaty was not different, in substance, in the matter involved here, from the treaty of the 30th of April, 1803, by which France ceded the Louisiana Territory to the United States. It was argued that the cession carried the title to all the lands in the Territory. Chief Justice Marshall said, in the opinion of the court, that it is unusual for the conqueror to do more than displace the sovereign, and assume dominion over the country, and that the sense of justice and right which is felt by the whole civilized world, would be violated if private property should be generally confiscated, and private rights annulled. He then continued: "The people change their allegiance—their relation to their ancient

sovereign is dissolved, but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulations respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government, would have been unaffected by the change. It would have remained the same as under the ancient sovereign." Again he said: "The cession of a territory, by its name, from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property." (7 Peters, 87.)

The case was referred to, and the doctrine applied, in Langdeau vs. Hanes (21 Wallace, 521), to the Northwest Territory and the cession of it by Virginia to the United States, under the act of its Legislature, passed on the 20th day of October, 1783, and the deed made by its delegates in Congress, carrying out that cession. In the deed it was provided: "That the French and Canadian inhabitants, and other settlers of the Kaskaskias, St. Vincennes and the neighboring villages, who have professed themselves citizens of Virginia, shall have their possessions and titles confirmed to them and be protected in the enjoyment of their rights and liberties." The court held that the acceptance by the United States of the deed and cession, imposed upon it the duty of confirming the conditions and giving the protection stipulated. It said in its opinion: "The United States took, therefore, the territory ceded by Virginia, bound by the established principles of public law, to respect and protect all private rights of property of the inhabitants of the country and bound by express stipulations to confirm the possessions and titles of the French and Canadian inhabitants and other settlers mentioned, in the deed of cession, who had professed themselves citizens of Virginia." (21 Wallace, 527-528.) See Jones vs. Meehan, 175 U. S., 1, 10, etc.

Foppiano's claim is that the right to the free use of the Mississippi River and its tributaries, without any tax, impost, duty or toll therefor, existed and was vested in all the inhab-

itants of the country in which the waters are, when the treaty between the United States and Great Britain of 1783, and when the treaty of 1803, between France and the United States, respectively, were made, and that such right so vested and complete, at those dates, passed along with the territory and the inhabitants from the sovereignty of Great Britain, and of France, respectively, to that of the United States, under the treaties; and that it has remained the same right, and has not been displaced, or in any way impaired by the changes in the government of the territory in which the river and its tributaries are located; and belongs as fully and perfectly to the present as to any past generation of those inhabitants.

In Worcester vs. the State of Georgia (6 Peters, 515), Worcester was indicted for residing in the Cherokee Nation in that State, without a license from the State, and without taking the oath of allegiance to the State, contrary to one of its statutes. He was convicted in a court of the State, and sued out a writ of error from the Supreme Court of the United States to the court convicting him. His defense was that he was a citizen of Vermont, and that he was in the Cherokee Nation as a missionary, under the authority of the President of the United States, preaching the Gospel, and translating the Scriptures, with the permission and approval of the Cherokee Nation, and that he was not subject to prosecution by the State of Georgia for the offense charged, because of the several treaties which had been made between the United States and the Cherokee Nation, by which the United States acknowledged the sovereignty of the Cherokee Nation and its authority to govern the people settled in its territory, free from any right of legislative interference by any State. The question was whether or not the treaty, or the statute of Georgia, was to govern. The court decided that the statute of the State was repugnant to the Constitution, treaties and laws of the United States, and that they constituted the supreme law, and so that the State statute was void, and the conviction under it without effect, and Worcester was discharged.

After reviewing the subject in all its branches from the discovery of the American Continent by Europeans, and from every point of view, Chief Justice Marshall said, that if the review was correct, the Acts of Georgia in question were

repugnant to the Constitution, laws and treaties of the United States. He said they interfered forcibly with the relations established between the United States and the Cherokee Nation, the regulations of which, according to the settled principles of our Constitution, are committed exclusively to the government of the nation. He said they were in direct hostility with treaties repeated in a succession of years, which marked out the boundary that separated the Cherokee country from Georgia, guaranteed to them all the lands within their boundary, solemnly pledged the faith of the United States to restrain their citizens from trespassing on it, and recognized the pre-existent power of the nation to govern itself. He said they were in equal hostility with the Acts of Congress regulating the intercourse, and giving effect to the treaties.

In disposing of the question whether the court could revise and reverse the judgment, and Worcester could avail himself of the facts and the law in his case, the Chief Justice said: "He was seized and forcibly carried away while under guardianship of treaties, guaranteeing the country in which he resided and taking it under the protection of the United States. He was seized while performing, under the sanction of the Chief Magistrate of the Nation, those duties which the humane policy adopted by Congress had recommended. He was apprehended, tried and condemned under cover of a law which has been shown to be repugnant to the Constitution, laws and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment—if punishment could be disgraceful when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the Constitution, laws and treaties of his country." (6 Peters, 561-562.)

In the New York Indians (5 Wallace, 761), the Indians had been in possession of lands, their ancient and native homes, the enjoyment of which, without disturbance by the United States, had been secured to them by treaty with the Federal Government, with the assurance that the lands should remain

theirs until they chose to sell them, and the State of New York, in which the lands were, enacted a statute authorizing a sale of the lands for taxes, and the court held that the State had no power to tax the lands, either for ordinary county and town purposes, or for the special purpose of surveying the lands and opening roads through them, and that the provision in the State statute that the sale for the purpose of collecting the tax should not in any manner affect the right of the Indians to occupy the lands, did not remove the objection to its constitutionality, and that notwithstanding that provision, the tax was void.

The Court of Appeals of New York had affirmed the validity of the tax under the statute, and the Supreme Court of the United States reversed its judgment, and remanded the cause, with directions to enter a judgment in conformity with its opinion.

In his concurring opinion in Pollard vs. Kibbe (15 Peters, 411, etc.), Justice Baldwin, after discussing the effect of treaties upon private rights, referred to the cases where compacts as to boundaries between States of the Union have been sustained and given effect, mentioning Irvine vs. Sims, 3 Dallas, 426; Marlatt vs. Silk, 11 Peters, 21; Robinson vs. Campbell, 3 Wheaton, 218; Burton vs. Williams, 3 Wheaton, 533; Handley vs. Anthony, 5 Wheaton, 377; Green vs. Biddle, 8 Wheaton, 13; Hawkins vs. Barney, 5 Peters, 464; New Orleans vs. United States, 10 Peters, 735, and New Orleans vs. De Armas, 9 Peters, 234, and concluded by saying: "All treaties, compacts and articles of agreement in the nature of treaties, in which the United States are parties, have ever been held to be the supreme law of the land, executing themselves by their own *fiat*, having the same effect as an act of Congress, and of equal force with the Constitution. And if any act is required on the part of the United States, it is to be performed by the executive, and not the legislative power, as declared in the case of The Peggy, in 1801, and since affirmed, with the single exception of only Foster & Elam." (15 Peters, 415.)

In *ex-parte* Crow Dog (109 U. S., 556), Justice Matthews said, referring to certain statutes of the United States, "that this legislation could constitutionally be extended to embrace Indians in the Indian country, by the mere force of

a treaty, whenever it operates of itself, without the aid of any legislative provision, was decided by this court in the case of the United States vs. 43 Gallons of Whiskey, 93 U. S., 188." (109 U. S., 567.)

In Foster vs. Neilson, Chief Justice Marshall said: "A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as the operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the Legislature whenever it operates of itself without the aid of any legislative provision." (2 Peters, 314.)

And the doctrine has become established, that like an act of Congress, or law of the United States, a treaty may be abrogated or repealed by an act of Congress. (Whitney vs. Robertson, 124 U. S., 290; The Head Money Cases, 112 U. S., 580; The Chinese Exclusion Case, 130 U. S., 581.)

It is just as well settled, however, that citizens or individuals may acquire private rights of property and other rights under treaties, and may have the benefit of such rights and enforce them by judicial remedies, in the same manner and to the same extent as if they existed or were conferred by national or State constitutions or other positive laws.

Thus, in the Head Money Cases (112 U. S., 580), Justice Miller said: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do, and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforce-

ment as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'This Constitution and the laws made in pursuance thereof and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land.' A treaty then is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined, and when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." (112 U. S., 598-599.)

In the early case of Ware vs. Hylton (3 Dallas, 199), Virginia by a statute during the Revolutionary War provided for the sequestration of debts due by its citizens to the subjects of Great Britain, and required payment of such debts into the State treasury. After the treaty was concluded between the United States and Great Britain, of the 3rd of September, 1783 (8 U. S. Statutes at Large, 80), which contained the provision that creditors on either side should meet with no lawful impediment to the full recovery of the value in sterling money of all *bona fide* debts theretofore contracted, a British creditor brought a suit against an American debtor to recover his debt, and the debtor pleaded in defense the sequestration act of Virginia and payment under it into the treasury of Virginia of the amount of the debt. The court held that the creditor could recover, and that the payment by the debtor constituted no defense. It seems to have been conceded that Virginia had the right to sequestrate the debt, but the treaty made under the Constitution of the United States was a supreme law, and displaced the act of Virginia and fixed the rights of the creditor and debtor.

In The United States vs. The Schooner Peggy (1 Cranch, 103), Chief Justice Ellsworth said: "The Constitution of the United States declares a treaty to be the supreme law of

the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and in the general superintended by, the executive of each nation, and therefore whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied, may still be asserted. But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court, as an act of Congress, and although restoration may be an executive, when viewed as a substantive act, independent of and unconnected with other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and, of consequence, improper." (1 Cranch, 109-110.)

A citizen of Switzerland, owning land in Virginia, died in 1861, intestate and without issue, leaving an alien heir and next of kin. Under the laws of Virginia the land escheated to the State, and the State took steps to sell the land as escheated. The next of kin of the Swiss owner filed a petition in the proceedings brought by the State to sell the land, to have the proceeds of the sale, when made, paid to him. The treaty between Switzerland and the United States of the 25th of November, 1850, removed the incapacity of the alien next of kin, so far as to enable him to recover and sell the lands and withdraw the export proceeds thereof. The court held that the treaty was the supreme law of the land, and that the next of kin was entitled to the proceeds. (Hauenstein vs. Lynham, 100 U. S., 483.)

The court observed in that case that the treaty-making clause of the Constitution is retroactive as well as prospective, and said that although the treaty involved in Ware vs. Hylton was made while the Articles of Confederation were in force, and before the adoption of the Federal Constitution, that the Constitution when adopted applied to it as among treaties "made and to be made." (100 U. S., 489.)

The court said further in that case: "It must always be borne in mind that the Constitution, the laws and treaties of

the United States, are as much a part of the law of every State as its own local laws and constitution. This is a fundamental principle in our system of complex national polity." (100 U. S., 490.)

"The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate." (Chief Justice Marshall in Cohens vs. Virginia, 6 Wheaton, 264, 414.)

The extent of the jurisdiction of the United States over the Territories, for the purposes of legislation, and also the extent of its power to make treaties, and the paramount force of the legislation enacted, and the treaty made, when brought in conflict with the legislation of the States, even as to matters clearly within their jurisdiction, except for the legislation of Congress, or the treaty, and the absence of power or jurisdiction in the States in such cases, are forcibly illustrated by such decisions as Fellows vs. Blacksmith, 19 Howard, 366; United States vs. Kagama, 118 U. S., 375, and United States vs. Rickert, 188 U. S., 431.

After the treaty of cession of 1803, by France to the United States, Congress passed an act, of 31st of October, 1803, for the purpose of taking possession of the Territory of Louisiana, and providing a temporary government. (2 U. S. Statutes at Large, 245.)

By the Act of February 24th, 1804, provisions were made for the levy and collection of duties on imports in the Louisiana Territory, and to extend to it certain described laws. (2 U. S. Statutes at Large, 231.) Subsequently, Congress passed an act extending the laws with reference to the registration and enrollment of vessels, and rights of ship owners, so as to include the inhabitants, on the 30th day of April, 1803, of the Louisiana Territory. (2 Statutes U. S. at Large, 259.)

On the 19th of March, 1804, Congress passed an act providing for the payment of the expenses of the temporary government in the Louisiana Territory. (2 U. S. Statutes at Large, 272.)

On the 26th day of March, 1804, Congress passed an act dividing the Louisiana Territory into two districts—the one to be known as the Orleans Territory, and to be governed separately, and the other was added to the territorial government then existing in the Indiana Territory, and the executive of that Territory was given power over that district. It was provided in this act that the laws in force in each of the Territories should remain in force until altered or repealed by legislation. (2 U. S. Statutes at Large, p. 283.)

On the 2nd of March, 1805 (2 U. S. Statutes at Large, p. 322), Congress passed an act providing for the government of the Orleans Territory, and in Section 7 of that act provided that the inhabitants of the Territory might be admitted as a State of the Union, provided they adopted a constitution not inconsistent with the Ordinance of 1787 for the government of the Northwest Territory. See also the Act of 3rd of March, 1805, 2 U. S. Statutes at Large, p. 331.

The Act of Congress of the 15th of February, 1811 (2 U. S. Statutes at Large, Chap. 14, Sec. 12, p. —), providing for the final adjustment of claims to lands and for the sales of the public lands in the Territories of Orleans and Louisiana, provided that all the navigable rivers and waters should be, and forever remain, public highways.

On the 20th of February, 1811, Congress passed the act enabling the people of Orleans Territory to form a constitution and State government. In that act it was declared that the convention of the people to be called to frame and adopt a constitution, should provide by an ordinance irrevocable without the consent of the United States, that the people inhabiting the said Territory did agree and declare that they forever disclaimed certain enumerated rights, and "that the Mississippi River and the navigable rivers and waters leading into the same should be common highways, and forever free, as well to the inhabitants of said State as to other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said State." (2 U. S. Statutes at Large, Chap. 21, Sec. 3, p. 642.)

And in the Act of the 3rd of March, 1811, already referred to (2 U. S. Statutes at Large, p. 666, Sec. 12), provid-

ing for the final adjustment of claims to lands in the Territories of Orleans and Louisiana, it was again provided that the navigable waters and rivers of the Territories should remain public highways forever.

After the territory composing the State of Louisiana had been organized as a State, and the State had been or was about to be admitted into the Union, Congress passed the Act of the 4th of June, 1812, providing for the government of the rest of the Louisiana Territory west of the Mississippi, and declared it should be called the Territory of Missouri. After providing for the organization of a government for that Territory, and prescribing the powers of the General Assembly to be created for the Territory, or rather certain limitations of the powers of such General Assembly, the act declared (Section 15, p. 747, 2 U. S. Statutes at Large) "that the Mississippi and Missouri Rivers, and the navigable waters flowing into them, and the carrying places between the same, should be common highways, and forever free to the people of the said Territory and to the citizens of the United States, without any tax, duty or impost therefor." When Missouri had been, or was about to be, admitted as a State, Congress, on the 2nd day of March, 1819, passed the act erecting a Territorial government in the southern part of the Territory of Missouri, and declared it to be named the Territory of Arkansas. It included all the territory on the west side of the Mississippi south of Missouri and north of Louisiana. It referred to the Act of the 4th of June, 1812, providing for the government of the Missouri Territory, and adopted as much of that act as related to the organization of the General Assembly therein provided for, and prescribed the powers and privileges of such General Assembly, and declared it should be in full force and operation in the Arkansas Territory, to the extent of its application. It also declared that all the laws which were in force in the Territory of Missouri on the 4th day of July, 1819, not inconsistent with the provisions of the act, and which should be applicable to the Territory of Arkansas, should be and continue in force in the latter Territory until modified or repealed by the legislative authority thereof. (3 U. S. Statutes at Large, p. 493.)

It can no longer be doubted that the United States acquired the Louisiana Territory lawfully, nor that it became

the sovereign of that Territory by the cession, subject to the provisions of the treaty, nor that it had the lawful power under the Constitution to govern that Territory in its discretion, nor that its governmental acts, legislative, executive and judicial in that Territory, while it exercised the powers of government, and before the Territory was made into States, were the acts of the rightful sovereign of the Territory, nor that the rights the people acquired to the lands and the waters located within the Territory, under its laws, or by grants made under its authority, vested in them absolutely, nor that they are entitled to the same protection with respect to those rights, that they would be entitled to, had they been acquired lawfully, directly from or under any one of the States, which have been formed out of the Territory, since they were admitted into the Union.

The power of Congress over the Territories, it has been frequently announced, is absolute and without limitation. McCulloch vs. Maryland, 4 Wheaton, 316, 422; United States vs. Gratiot, 14 Peters, 537; National Bank vs. County of Yankton, 101 U. S., 129; Murphy vs. Ramsey, 114 U. S., 44-45; Mormon Church vs. United States, 136 U. S., 1; De-Lima vs. Bidwell, 182 U. S., 196-197; Downes vs. Bidwell, 182 U. S., 267-268.)

In The Mormon Church vs. United States, Justice Bradley said: "The Territory of Louisiana, when acquired from France, and the Territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the Government, in its diplomatic negotiations, had seen fit to accept, relating to the rights of the people then inhabiting those Territories. Having rightfully acquired said Territories, the United States Government was the only one which could impose laws upon them, and its sovereignty over them was complete." (136 U. S., p. 42.)

In National Bank vs. County of Yankton (101 U. S., 129), Chief Justice Waite said: "All Territories within the jurisdiction of the United States, not included in any State, must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion (domain) of the United States. Their

relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations." And again: "Congress is supreme, and for the purposes of this department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution." And further: "Congress has full and complete legislative authority over the people of the Territories, and all the departments of the territorial government. It may do for all Territories what the people under the Constitution of the United States may do for the States." (101 U. S., 133; Shively vs. Bowlby, 152 U. S., 1, 28, 47-48, 50 and 57-58; Johnson vs. McIntosh, 8 Wheaton, 584, etc.; Downes vs. Bidwell, 182 U. S., 279, 283, etc.)

In DeLima vs. Bidwell (182 U. S., 1), Justice Brown, delivering the opinion of the court, said that whatever is the source of the power, the uninterrupted exercise by Congress for a century, and the repeated declarations of the court had settled "the law that the right to acquire territory involves the right to govern and dispose of it." And again: "Indeed, it is scarcely too much to say that there has not been a session of Congress since the Louisiana Territory was purchased, that that body has not enacted legislation based upon the assumed authority to govern and control the Territories. It is an authority which arises, not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the States to act upon the subject. Under this power Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a State upon an equality with other States; it may sell its public lands to individual citizens, or may donate them as homesteads to actual settlers. In short, when once acquired by treaty, it belongs to the United States, and is subject to the disposition of Congress." (182 U. S., 196-197.)

And when Congress in organizing a territorial government extends the Constitution and laws of the United States to such Territory, such Constitution and laws become fundamental and obligatory, and any legislation by the Territorial

Legislature contravening them is void. (American Publishing Co. vs. Fisher, 166 U. S., 464; Thompson vs. Utah, 170 U. S., 343.)

The essential claim of the inhabitants of the Mississippi Valley, it will be observed, was not originally simply of the right to navigate the river and its tributaries, or to engage in commerce upon those waters, but that the river and all the waters were, and were forever to be, free and common highways to all the inhabitants of the Mississippi Valley, and that they had the right forever to enjoy that river and those waters without any tax, duty, impost or toll therefor, imposed by any sovereign. The same claims were asserted after the cession of the Louisiana Territory by France to the United States. The Acts of Congress, elsewhere referred to, show that those claims were persistently set up while any part of the Louisiana Territory constituted a Territory of the United States. And when the several States were formed out of that Territory, as will appear further along, the same claims were made, and the States respectively were required, and did consent to admit them in language as broad and unmistakable as that in which the rights had originally been asserted.

Although the inhabitants had the assurance in the treaty with France that they should be incorporated in the Union of the United States and admitted, as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States, they were not satisfied to leave the use of the Mississippi River and its tributaries, free to them and their posterity without the payment of any tax, duty, impost or toll therefor, to such security as the National Constitution, and the constitutions to be formed for the several States, upon their admission as States of the Union afforded. They required further guarantees of those rights, and had them placed in the compacts between the United States and each of the States made out of the Louisiana Territory, afterwards admitted into the Union.

And the guarantee required by North Carolina, when the territory constituting Tennessee was ceded to the United States, that the navigable waters leading into the Mississippi and the St. Lawrence should be common highways, and for-

ever free, as well to the inhabitants of Tennessee as to the citizens of the United States and the States to be admitted into the Confederacy, without any tax, impost or duty therefor, and that the people of Tennessee should never be deprived of any of the privileges enjoyed by the people of the territory west of the Ohio, was not allowed to stand upon those laws or that compact, but the people of Tennessee, as already stated, in their constitution of 1796, accepted and agreed to by Congress in admitting the State, and in their constitution of 1834, and that of 1870, solemnly declared that an equal participation in the free navigation of the Mississippi is one of the inherent rights of the citizens of Tennessee, and it cannot therefore be conceded to any prince, potentate, power, person or persons whatsoever.

It was not claimed that the right was exclusive in the citizens of the State, or that they had any preference, or that it was not free to the other inhabitants of the Mississippi Valley, as well as to them, but only an equal participation in the free navigation of the river was claimed. There could be no participation in any free navigation, if Tennessee, or any other State could levy a tax, duty, impost or toll thereon. The constitution of Tennessee, therefore, is a clear declaration of the freedom of the navigation of the Mississippi River from any taxation, and of the further fact that the same right is inherent in all the other inhabitants of the States fronting the river.

The theory has always been that the right to the free use of the Mississippi River and its tributaries rested on the law of nature and of nations, and is inherent in all the inhabitants of the territory in which those waters are located. The people remembered the difficulty of establishing that right, and determined to put it on a substantial basis—one that could never be questioned.

Perhaps the magnitude of the Mississippi River and its tributaries was the principal ground of this precaution. In the days when the doctrine of the free use of the river and its tributaries by all its inhabitants was first asserted, they drained, as they do now, half the continent, and were the principal avenues of commerce for the sparse population then inhabiting that vast territory. There were no railroads operated

by steam, and no steam navigation. All that has changed now, but it is a fact, notwithstanding, that the Mississippi River and its tributaries form portions of the boundaries of nearly twenty different States of the Union, and it and those tributaries extend from the Allegheny Mountains on the east to the Rocky Mountains on the west, and are used by many millions of people, and support an immense commerce.

In Downes vs. Bidwell, Justice Brown said the question of the legal relations between the States and the newly acquired Territories first became the subject of public discussion in connection with the purchase of Louisiana, and that that purchase arose primarily from the fixed policy of Spain to exclude all foreign commerce from the Mississippi. (182 U. S., 251.) After stating certain of the facts relating to the acquisition of Louisiana, and the questions with reference to it which were discussed in Congress, he said "that the administration party took the ground that under the constitutional power to make treaties there was ample power to acquire territory, and to hold and govern it under laws to be passed by Congress, and that as Louisiana was incorporated into the Union as a Territory and not as a State, a stipulation for citizenship became necessary; that as a State, they would not have needed a stipulation for the safety of their liberty, property and religion; but as a Territory this stipulation would govern and restrain the undefined powers of Congress to make rules and regulations for Territories." (182 U. S., 254.)

And the position that there was ample ground to acquire territory under the power to make treaties seems to have been the recognized law, as Chief Justice Marshall said in the American Insurance Co. vs. Canter (1 Peters, 542): "That the Constitution confers absolutely on the government of the Union the powers of making war and of making treaties—consequently, the government possesses the power of acquiring territory, either by conquest or by treaty."

There is this difference between the States formed out of the Louisiana Territory and the thirteen Colonies united as the States of the Union under the Constitution. The latter were sovereign before the Constitution was formed, and had separately all the powers of government that a free people could possess. They respectively retain what they did not

surrender by the Constitution. After the treaty with France the United States was the sovereign paramount of the Louisiana Territory, and so remained until, with its consent, and at different times, portions of that Territory were erected into States of the Union, and those States, within their respective boundaries, succeeded to the sovereignty of the United States, except for the compacts they made, and the purposes of the Constitution.

Mr. Farnham says: "The title to the soil in the territory which had not been organized into States, however, was in the General Government, and was subject to its disposal. While a territorial form of government exists the United States, as sovereign and proprietor, may dispose absolutely of all the public lands therein, whether above or below high water mark. As sovereign, it has the *jus publicum*, or right of jurisdiction and control of the shores for the benefit of the public as in the case of a public highway over private land, while as proprietor, it has the *jus privatum*, or right of private property, which it can grant to private individuals, subject to the *jus publicum*. Upon the admission of the Territories into the Union as States, this title was relinquished to the new States upon the sole condition, in some instances, that prior grants of the government should be confirmed, and that the waters should remain highways, free to the citizens of the United States." (1 Farnham on Waters, Sec. 10, pp. 48-49.)

The condition referred to has been in the compact between the United States and almost every State admitted into the Union since the year 1812. As to the States on the Mississippi River and its tributaries, it has been provided in those compacts that the river and its tributaries shall remain forever free to the inhabitants of the State and the other citizens of the United States, without any tax, duty, impost or toll. All the statesmen who helped to make those compacts knew of the importance and value to the people of that right, and of the contest with Spain with reference to it, and of the determination of the people to possess it, and their purpose to preserve and perpetuate it appears upon every page of the history of the times. Were they ignorant of the powers and authority with reference to compacts, of the United States and the people of the respective Territories, about to be made States? Have they failed for want of knowledge, in their efforts to put the

right they most prized—the free use of the navigable waters—upon a secure foundation? Is it true that the compacts made between the United States and the respective States, when they were admitted into the Union, are mere waste paper? To hold so would be to overturn the uniform practice in the admission of new States.

Louisiana was admitted as a State by the Act of Congress of the 8th of April, 1812. It was expressed in the act "that it shall be taken as a condition upon which the said State is incorporated in the Union, that the River Mississippi and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways and forever free, as well to the inhabitants of the said State as to the inhabitants of other States and the Territories of the United States, without any tax, duty, impost or toll therefor, imposed by the said State; and that the above condition, and also all other, the conditions and terms contained in the 3rd section of the act, the title whereof is hereinbefore recited (an act to enable the people of the Territory of Orleans to form a constitution and State government, and for the admission of the said State into the Union on an equal footing with the original States, and for other purposes, approved February 20, 1811 (2 U. S. Statutes at Large, p. 641), will be considered, deemed and taken fundamental conditions and terms upon which the said State is incorporated in the Union." (2 U. S. Statutes at Large, p. 701; Brightly's Digest of the Laws of the United States, pp. 582-583.)

Mississippi was authorized by an act of Congress to form a government as a State on the 1st day of March, 1817. (3 U. S. Statutes at Large, p. 348.) The State of Tennessee was its northern boundary and the Mississippi River was its western boundary.

The convention to form the constitution for the State was required by an ordinance, irrevocable without the consent of the United States, to agree and declare on behalf of the people inhabiting the Territory, among other things, "that the River Mississippi and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways and forever free, as well to the inhabitants of the said

State as to the other citizens of the United States, without any tax, duty, impost or toll therefor imposed by the said State." (Brightly's Digest of the Laws of the United States, p. 639.)

Missouri was the next State to be admitted. That was done by the Act of Congress of the 6th of March, 1820. (3 U. S. Statutes at Large, p. 545.)

The middle of the Mississippi River, from the mouth of the Des Moines River to parallel 36 degrees 30 minutes north latitude, its southern boundary, was made the eastern boundary of the State. It was declared in a proviso "that the said State shall have concurrent jurisdiction on the River Mississippi, and every other river bordering on the said State, so far as the said river shall form a common boundary to the said State, and any other State or States, now or hereafter to be formed, and bounded by the same—such rivers to be common to both; and the River Mississippi, and the navigable rivers and waters leading into the same, shall be common highways and forever free, as well to the inhabitants of the said State as to the other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said State." (Brightly's Digest of the Laws of the United States, pp. 645-646.)

Arkansas remained a Territory of the United States until the 15th day of June, 1836, when the act of Congress of that date, declaring the State to be one of the United States, and admitted into the Union on an equal footing with the original States in all respects whatever, was passed. (5 U. S. Statutes at Large, p. 50.) The middle channel of the Mississippi River, south of 36 degrees north latitude, was made the eastern boundary of the State. In that act it was declared, among other things, that Arkansas was admitted as a State on the express condition that the State of Arkansas should have the same grants, subject to the same restrictions, which were made to the State of Missouri by virtue of an act entitled "an act to authorize the people of Missouri Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States and to prohibit slavery in certain territories," approved the 6th day of March, 1820.

The constitution of Arkansas of 1836, in the preamble, declared that the people of the Territory of Arkansas had the right of admission into the Union as one of the United States of America, consistent with the Federal Constitution, and by virtue of the treaty of cession by France to the Uinted States of the province of Louisiana, in order to secure to themselves and their posterity the enjoyment of all the rights of life, liberty and property, and the free pursuit of happiness. The constitution made the middle of the main channel of the Mississippi River, from 36 degrees north latitude, to the north line of the State of Louisiana, in the middle of the Mississippi River, the eastern boundary of the State.

Iowa was admitted as a State by the Act of Congress of the 3rd of March, 1845. (5 U. S. Statutes at Large, p. 742.) That act declared that Iowa should have concurrent jurisdiction on the River Mississippi and every other river bordering on the State of Iowa, so far as such rivers should form a common boundary to the State, and any other State or States then or thereafter to be formed, or bounded by the same—such rivers to be common to both. It declared further that the River Mississippi, and the navigable waters leading into the same, should be common highways and forever free, as well to the inhabitants of Iowa as to all other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the State of Iowa. (Brightly's Digest of the Laws of the United States, pp. 442-443.)

Minnesota was admitted as a State under the Act of Congress of February 26, 1857 (11 U. S. Statutes at Large, p. 166), and the 11th day of May, 1858 (11 U. S. Statutes at Large, p. 285). It was declared in that legislation that Minnesota should have concurrent jurisdiction on the Mississippi River and all other rivers and waters bordering on the State, so far as the same should form a common boundary to the State and any other State or States, then or thereafter to be formed or bounded by the same, and that the River Mississippi and waters and the navigable waters leading into the same should be common highways and forever free, as well to the inhabitants of the State as to all other citizens of the United States, without any tax, duty, impost or toll therefor.

Probably all the other new States have been admitted into the Union on conditions, or with restrictions as to the use of

the public navigable waters, similar to those of the States immediately bordering the Mississippi River, to which we have specially referred. The experience of the pioneers of the Mississippi Valley in their many and fierce conflicts with Spain, with reference to the Mississippi River, have not been forgotten or ignored by their descendants. Mr. Jefferson had said and had maintained that the inhabitants of the Mississippi Valley had an inherent right to the free navigation of the Mississippi River, and that they did not need any grant of that right from Spain or any one.

The announcement of this doctrine may have been original with Mr. Jefferson, and it may not have been the generally received doctrine among nations at the time. If true when Mr. Jefferson made it the basis of the negotiations of the United States with Spain, it has remained true since, and is equally true today. It was adopted by the nation when probably it was contemplated that the possessions of Spain, and those of the United States along the Mississippi and its tributaries were to remain fixed permanently as they then were. Had such possessions so remained, it cannot be doubted today that the United States would have insisted on the doctrine and have maintained it by force, if required. The right to the free use of the Mississippi River by the people of the territory through which it flows, Mr. Jefferson said, stood on the broad and unquestionable ground of the law of nature and of nations, and that the incidental right to the use of its shores was included, and though Spain was the undisputed sovereign and owner of both banks of the river from Bayou Manchac, or the 31st degree of north latitude to the Gulf of Mexico, his position was that the right of the inhabitants to the free use of the river from its source to the sea, was inherent and that the United States did not need and would not accept any grant of the right from Spain. If the right of the inhabitants had the basis Mr. Jefferson rested it on, then the change of sovereignty and of ownership of the country the Mississippi and its tributaries watered, from Spain to France, and from France to the United States, could not impair or affect it. Those inhabitants had, before either Spain, France or the United States came into the country, the right to the free use of the river and its tributaries, and when those powers successively dominated the territory, it was, theoretically, at least, always with the acknowledgment of the established right of those inhab-

itants to the free use of them. As a matter of law the devolutions of the sovereignty and ownership of the territory from Spain to France, and from France to the United States, did not as an incident, displace or disturb the right of the inhabitants to the free use of the river or its tributaries. That right remained the same through and notwithstanding the successive changes. As a matter of fact, in the treaties and in what was done between Spain and France, and Spain and the United States, and France and the United States, particular care was taken to preserve and protect all the rights they then had, and among them the right of the inhabitants to the free use of the Mississippi River and its tributaries. The right of free use of the river and its tributaries was not only agreed to and contracted for, but it was distinctly stated many times, and both in the treaties and in legislative acts. In addition, it was specially declared that such right should be exercised "without any tax, impost, duty or toll therefor." This probably was not necessary, as "free use" means the same thing.

Suppose Mr. Jefferson was wrong theoretically, when he put the right of the inhabitants of the territory in which the Mississippi is to its free use, on the ground of the law of nature and of nations, or that it was an inherent right in those inhabitants, or that it required no grant from any earthly power, his position was that of the people of the United States, and was successfully maintained, and has been ingrained and crystallized in the national life, so thoroughly that its truth can no more be questioned by the people of the United States, or its government, legislative, executive or judicial, than can the great principles embodied in the Declaration of Independence, the production of the same great man. But was he wrong? (See King vs. Hammond, 10 Modern, 382; Angell on Highways, Secs. 53-55; Gould on Waters, Secs. 54 and 86; 1 Farnham on Waters, Sec. 27, pp.130-133; Shively vs. Bowlby, 152 U. S., 11-14; Cooley's Constitutional Limitations (6 Ed.), Chap. 16, pp. 726-728; The Queen vs. Saintliff, 6 Modern, 255; 3 Kent's Com., 427.)

It has been said repeatedly in judicial opinions, in substance, that by the admission of a State into the Union on an equal footing with the original States in all respects whatever, the Ordinance of 1787 for the government of the Northwest Territory, and the acts of admission containing similar

provisions, ceased to have any effect within the limits of the State, and that there was, after the admission, no law of the United States regulating the use of the navigable waters of the United States within the State, and so the State had exclusive jurisdiction in the premises. The cases usually relied on for this position are Pollard vs. Hagan, 3 Howard, 212; Permoli vs. Municipality No. 1, 3 Howard, 589; and Strader vs. Graham, 10 Howard, 82.

Judge Deady reviewed these cases in Willamet Iron Bridge Co. vs. Hatch (19 Federal Reporter, 347). He said Pollard vs. Hagan simply held that Congress cannot by any compact or condition made with or laid upon a State on her admission into the Union restrain or limit her municipal powers as such State, but that if the subject of the compact or condition is within the power of Congress to enact or regulate without the consent of the State—as to declare that the navigable waters therein shall be common highways—it is good as a law. Permoli vs. Municipality No. 1, he said, held that so much of the articles of compact as secured religious freedom to the inhabitants of the Territory of Louisiana—the same having been specially extended by Congress—ceased to have any force or effect therein, upon the admission of the Territory into the Union as the State of Louisiana—religious freedom being beyond the power of Congress, and exclusively within the power of the State. Strader vs. Graham, he said, decided that the condition of a negro held as a slave in Kentucky, who had been allowed to go to Ohio, and afterwards returned to Kentucky, after his return, was a question arising solely under the law of Kentucky, and therefore not within the jurisdiction of the Supreme Court of the United States, on a writ of error to the Supreme Court of Kentucky. (See 19 Federal Reporter, 357-358.)

Chief Justice Taney said, in Strader vs. Graham (10 Howard, 96), that the people who filled the Northwest Territory became inhabitants after the Constitution was adopted, and "migrated upon the faith that its protection and benefits would be extended to them, and that they would, in due time, according to its provisions and spirit, be admitted into the Union on an equal footing with the old States. For the new government secured to them all that the public rights of navigation and commerce which the Ordinance did or could pro-

vide for, and moreover, extended to them, when they should become States, much greater power over their municipal regulations and domestic concerns than the Confederation had agreed to concede." He said further that the most of the material provisions of the six articles of the Ordinance of 1787, not inconsistent with the Constitution of the Uinted States, had been the established law within the Northwest Territory ever since the ordinance was passed, but they "owed their legal validity and force, after the Constitution was adopted, and while the territorial government continued, to the Act of Congress of the 7th of August, 1789, which adopted and continued the Ordinance of 1787, and carried its provisions into execution, with some modifications, which were necessary to adapt its form of government to the new Constitution. And in the States since formed in the Territory, these provisions, so far as they have been preserved, owe their validity and authority to the Constitution of the United States, and the constitutions and laws of the respective States, and not to the authority of the Ordinance of the old Confederation." (10 Howard, 96-97.)

If the Chief Justice meant such rights to the free use of the Mississippi River as are involved here, that is, the right to the free use of the river without any license or tax, then the substantial point, in what we have quoted from his opinion, is that the inhabitants of the States, formed out of the Northwest Territory, independently of that ordinance, do possess all the rights of navigation and commerce, that is, all the right to the free use of the navigable waters without any tax, duty, impost or toll, which the Ordinance of 1787, for the government of that Territory, did or could provide for. If, as a fact, the rights claimed by Foppiano are conceded to belong to him as a citizen of the United States, for the purposes of the present case, as we insist elsewhere, it is not material whether they are based on the law of nature and of nations, or the deed North Carolina made the United States, ceding Tennessee, or the deed Virginia made the United States, ceding the Northwest Territory, or the Ordinance of 1787, or the legislation of Congress before or after the Constitution of the United States was adopted, and prior to the admissions of the several States, as members of the Union, or the treaty with France, and the prior treaties, or the compacts between the United States and the several States, when the States respectively were admitted,

or jointly on the constitutions and laws of the respective States, and the Constitution and laws of the United States, after they had become States.

From whatever source they have come, those rights are protected by the Constitution of the United States, as the rights of a citizen of the United States, and cannot be infringed by any State.

But does history sustain the statement of facts made by the Chief Justice? Did the people who filled the Territories migrate upon the faith of the protection and benefits that would be extended to them under the Constitution of the United States, and become inhabitants relying upon the admission of the new States into the Union on an equal footing with the original States, as a sufficient guarantee and protection to their right to the free use and navigation of the navigable waters, without any tax, duty, impost or toll? The fact that the compacts as to the freedom of the navigable waters were exacted and entered into in the case of the admission of every new State is a sufficient refutation of the statement.

If it is even true that the Ordinance of 1787 has become ineffectual for any substantial purpose in the Northwest Territory, or the States made out of it, it does not follow that the same is true in the Southwest Territory, or Tennessee, or the Louisiana Territory, or the States made out of that Territory, or in any of the new States admitted. The Ordinance of 1787 was first made a part of the compact between the United States and North Carolina in 1790, after the Constitution of the United States had been adopted, when the Southwest Territory was ceded by North Carolina to the United States, to become a State. The obligatory force of the ordinance was stated in the constitution of Tennessee of 1796, and the freedom of the navigation of the Mississippi River was declared in that constitution, and the United States agreed to both these facts in accepting the constitution, and admitting Tennessee as a State of the Union under it. The States made out of the territory ceded by Georgia, have the deed of cession made by Georgia to the United States and the compacts between them and the United States, when they respectively were admitted as States. And the States made out of the Louisiana Territory have the treaties between Great Britain and

France, Spain and France, Great Britain and the United States, Spain and the United States and France and the United States, and in addition, the compacts between the United States and each of them when they respectively were admitted as States of the Union. All these proclaim the free use of the Mississippi River and its tributaries to the inhabitants, and to the citizens of the United States, without any tax, duty, impost or toll therefor.

Is there any virtue in the compacts?

A State may enter into a contract and subject itself to the performance of the obligations created, to the same extent as an individual, and such contract is protected by the provision in the Constitution of the United States forbidding the passage of any law impairing the obligations of contracts. (Fletcher vs. Peck, 6 Cranch, 87.)

While it is true that a State cannot be sued without its consent, either in its own courts, or in the courts of the United States, and so cannot be compelled by the processes of the courts to perform its contracts, any attempt on its part to violate property, or rights acquired under its contracts, may be judicially resisted, and any law impairing the obligation of contracts, under which such property or rights are held, is void and powerless to affect their enjoyment. (Hans vs. Louisiana, 134 U. S., 1.)

A State may surrender the fundamental power of taxation, either absolutely or to any qualified extent it chooses to agree to. It may do so in ordinary legislation, by making grants, or establishing the privileges or immunities, to be accepted and acted upon by the parties to whom the grant, or offer, is made. (Davis vs. Gray, 16 Wallace, 204.) Where it creates a corporation, for instance a bank, and provides in the charter that the bills or notes of such bank shall be received in payment of taxes or debts due it, or that the stock shall not be taxable, or taxable only to a certain extent, the State is absolutely bound by the contract contained in the bill or note or stock issued, in favor of every holder. The contract of the State with such holder cannot be impaired. (Gordon vs. The Appeal Tax Court, 3 Howard, 338; Woodruff vs. Trapnall, 10 Howard, 190; Curran vs. The State of Arkansas, 15 Howard, 304; Furman vs. Nichol, 8 Wallace, 44; Farrington vs.

Tennessee, 95 U. S., 679; Keith vs. Clark, 97 U. S., 454; State Bank vs. Knoop, 16 Howard, 369.)

If a State may thus surrender its sovereignty, it is difficult to see what objection there can be to its entering into a compact with another State, with the concurrence of Congress, where such concurrence is required, or with the United States, or its own citizens, or the inhabitants of a Territory, where it is under no restriction, with reference to property, or the rights of property, or even certain classes of personal rights, not necessarily involving the exercise of the inalienable powers of government. (Cooley's Constitutional Limitations (6 Ed.), Chap. 9, p. 341, etc.)

In Farrington vs. Tennessee, the court said: "A compact lies at the foundation of all national life. Contracts mark the progress of communities in civilization and prosperity. They guard, as far as is possible, against fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellow men. They are the springs of business, trade and commerce. Without them society could not go on. Spotless faith in their fulfillment honors alike communities and individuals. Where this is wanting in the body politic, the process of descent has begun, and a lower plane will be speedily reached. To the extent to which the defect exists among individuals, there is decay and degeneracy. As are the integral parts so is the aggregated mass. Under a monarchy or an aristocracy, order may be upheld and rights enforced by the strong arm of power, but a Republican government can have no foundation other than the virtue of its citizens. When that is impaired, all is periled. It is needless to lift the veil and contemplate the future of such a people." (95 U. S., 682.)

The case of Poole vs. Fleeger (11 Peters, 185), decided that Tennessee and Kentucky, by the compact between them of 1820, had the right to fix their boundary, subject only to the consent of Congress, and left undecided only the question whether such a compact is an exception to the prohibition in the Constitution to any State to pass any law impairing the obligation of a contract.

The case of Georgetown vs. Alexandria Canal Co. (12 Peters, 95), recognized the compact between Maryland and

Virginia of 1785 as to the Potomac River as valid. (See page 97, etc.), and in Wharton vs. Wise, 153 U. S., 155, it was held binding and effectual.

The cases of Searight vs. Stokes (3 Howard, 151); Neil vs. Ohio (3 Howard, 720), and Atchison vs. Huddleston (12 Howard, 293), each recognized as valid, and enforced the compacts between the United States and Pennsylvania, Ohio and Maryland, respectively, as to the portions of the Cumberland Road, within their respective borders, which they respectively took possession of by acts of their respective Legislatures, upon terms and conditions prescribed in Acts of Congress (4 U. S. Statutes at Large, 483, 553, 655, 680 and 772). Each State levied a tax in violation of the compact, and the court held each tax unlawful and void because the compact was violated.

The seventh article of the compact between Virginia and Kentucky, upon the separation of Kentucky from Virginia, which afterwards was made a part of the constitution of Kentucky, declared, "that all private rights and interests in lands within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State." After Kentucky had been admitted as a State, it enacted a statute relieving the occupant of land from paying damages for its wrongful detention before action brought, and requiring the lawful owner of the land to pay the occupant for his improvements. The validity of the statute was denied by the owner of the land, who brought a suit against the occupant of the land who claimed the benefit of the Statute. The Supreme Court decided (1) that the compact between Virginia and Kentucky was a contract protected by the provision in the tenth section of the first article of the Constitution of the United States; (2) that it is not necessary that the consent of Congress to a compact between two States should be expressed in any particular form, and that when Congress consented to the separation of Kentucky and its creation into a State, it must be taken to have consented to the compact by which the separation was agreed to be made; (3) that it was not a valid objection to the compact that it restricted the exercise of the legislative power of Kentucky in certain particulars; (4) that the statute of Kentucky, relieving the occu-

pant of land from paying damages for its wrongful detention, before action brought, and requiring the lawful owner of the land to pay the occupant for his improvements, did impair the obligation of that part of the compact, declaring that all private rights and interests in land within Kentucky, derived from the laws of Virginia, should remain valid and secure, under the laws of Kentucky, and should be determined by the laws existing in Virginia when the compact was made, and therefore, as to the owner of the land, was void. (Green vs. Biddle, 8 Wheaton, 1.)

Justice Washington, in the principal opinion, after adverting to the duty of the court to declare a law unconstitutional which impairs the obligation of contracts, whoever may be the parties to them, and the establishment of that doctrine by the prior decisions, said: "A slight effort to prove that a compact between two States is not a case within the meaning of the Constitution which speaks of contracts, was made by the counsel for the tenant, but was not much pressed. If we attend to the definition of a contract, which is the agreement of two or more parties to do or not to do certain acts, it must be obvious that the propositions offered and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous, and in Fletcher vs. Peck (6 Cranch, 87) the Chief Justice defines a contract to be a compact between two or more parties. The principles laid down in that case are, that the Constitution of the United States embraces all contracts, executed or executory, whether between individuals or between a State and individuals, and that a State has no more power to impair an obligation into which she herself has entered than she could the contracts of individuals. Kentucky, therefore, being a party to the compact which guaranteed to claimants of land lying in that State, under titles derived from Virginia, their rights as they existed under the laws of Virginia, was incompetent to violate that contract by passing any law which rendered those rights less valid and secure." (8 Wheaton, p. 92.)

In Pennsylvania vs. Wheeling & Belmont Bridge Co. (13 Howard, 518), the compact between Virginia and Kentucky was again the subject of consideration. The portion of it involved in that case was the provision that the use and navigation of the Ohio, so far as the Territory of Virginia or Ken-

tucky was concerned, should be free and common to the citizens of the United States. An act of the Legislature of Virginia had authorized the construction of a bridge across the river. It was claimed on the part of Pennsylvania that the bridge would obstruct the navigation of the river to and from the ports of Pennsylvania by steamboats and other water craft which navigated the river, and that the State owned valuable public works, canals and railways, constructed at great expense, terminating on the river, and constructed with reference to its free navigation and the transportation of goods and passengers in steamboats and other craft. The court held that the Ohio, being a public, navigable stream, of right should remain free and unobstructed; that the Wheeling bridge was an obstruction of the free navigation by vessels propelled by steam, and that the law of the State of Virginia authorizing the obstruction was void, (1) because it impaired the obligation of the compact between Virginia and Kentucky, that the use and navigation of the Ohio, so far as the territory of Virginia and Kentucky was concerned, should be free and common to the citizens of the United States, and (2) because it was in conflict with the legislation of Congress which regulated the commerce among different States and with foreign nations, carried on upon the river.

In delivering the opinion, Justice McLean said: "This compact by the sanction of Congress has become a law of the Union. What further legislation can be desired for judicial action? In the case of Green vs. Biddle (8 Wheaton, 1) this court held that a law of the State of Kentucky, which was in violation of this compact between Virginia and Kentucky, was void, and they say this court has authority to declare the State law unconstitutional upon the ground of its impairing the obligation of a compact between different States of the Union." Again, he said: "No State law can hinder or obstruct the free use of a license granted under an act of Congress, nor can any State violate the compact, sanctioned as it has been, by obstructing the navigation of the river." (13 Howard, p. 566.)

Referring to the compact between Kentucky and Virginia and the claim that the Act of Congress of the 31st of August, 1852 (10 Statutes U. S. at Large, 112), was void for the reason that it was inconsistent with that compact, Justice Nelson,

on the second occasion when the case of Pennsylvania vs. Wheeling & Belmont Bridge Co. came before the court, said: "This court held in the case of Green vs. Biddle (8 Wheaton, 1) that an act of the Legislature of Kentucky in contravention of the compact, was null and void, within the provision of the Constitution forbidding a State to pass any law impairing the obligation of contracts. But that is not the question. The question here is whether or not the compact can operate as a restriction upon the power of Congress under the Constitution to regulate commerce among the several States. Clearly not. Otherwise, Congress and two States would possess the power to modify and alter the Constitution itself.". (18 Howard, pp. 432-433.)

The class of cases of which Pennsylvania vs. Wheeling & Belmont Bridge Co., just referred to, Wilson vs. The Blackbird Creek Marsh Co. (2 Peters, 245); Withers vs. Buckley (20 Howard, 84); Gillman vs. Philadelphia (3 Wallace, 713); Pound vs. Turck (95 U. S., 459); County of Mobile vs. Kimball (102 U. S., 691); Escanaba Co. vs. Chicago (107 U. S., 678); Huse vs. Glover (119 U. S., 543); Cardwell vs. American Bridge Co. (113 U. S., 205), and The Lindsey and Phelps Co. vs. Mullen (176 U. S., 126, 148, etc.), are examples, have no application to the questions presented in this case.

Escanaba Co. vs. Chicago involved the Chicago River, which was wholly in Illinois. Wilson vs. The Blackbird Creek Marsh Co. involved a navigable water wholly in Delaware. Gillman vs. Philadelphia involved the Schuylkill River, wholly in Pennsylvania. All the other cases are similar, or else involved only the power of a State in the regulation of internal commerce to authorize temporary obstructions or improvements in navigable waters in the State, for the benefit of commerce, or to allow charges to be made for the use of the artificial improvements made in natural navigagle waters.

Here, Foppiano is claimed to be subject to a license from the State of Tennessee, and the payment of a tax therefor, as a prerequisite to his use of the Mississippi River in its natural state, for the purpose of his business. The right to license includes the right to prescribe the conditions on which the license shall be granted, and also includes the power to refuse

the license altogether, and necessarily it includes the ultimate power of making the use of the river without the license a penal offense and punishable. Therefore, the power to license includes the power to destroy the right to use the river at all. And so of the tax, which it is claimed Foppiano must pay, before he can carry on his business while using the river. It may be put so high or otherwise burdensome as to prevent his use of the river. (Harman vs. Chicago, 147 U. S., 406-407; McCulloch vs. Maryland, 4 Wheaton, 427, etc.; Brown vs. Maryland, 12 Wheaton, 439, etc.)

In the Kansas Indians (5 Wallace, 737) it was held that the State of Kansas, after its admission as a State, could not tax the lands held in severalty by individual Indians through patents issued to them by the United States under treaties made with their respective tribes by the United States, while Kansas was a Territory of the United States, providing that the lands should not be liable to taxation so long as they continued to be the property of the Indians. In answering the objection that the sovereignty of the State was involved, and the equality of the State with the other States impaired, if the power of taxation by the State could not be exercised, the court said: "There can be no question of State sovereignty in the case, as Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired and the General Government at liberty to make any regulations respecting them, their lands, property or other rights, which it would have been competent to make if Kansas had not been admitted into the Union." (5 Wallace, 756.)

The court said further, speaking of the Indians in the State, after its admission: "While the General Government has a superintending care over their interests and continues to treat them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulations or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character, they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws." (5 Wallace, 757.)

In The United States vs. Forty-three Gallons of Whiskey (93 U. S., 188) a treaty had been made between the United States and an Indian tribe located within the territorial limits of Minnesota after its admission as a State. The treaty provided: "The laws of the United States now in force or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded, until otherwise directed by Congress or the President of the United States." The libel alleged that the liquors were introduced into the village of Crookston, in the county of Polk, in the State of Minnesota, after that county had been organized out of the ceded territory, contrary to the treaty and the act of Congress regulating the sale or other disposition of liquors, to Indians in charge of agents of the United States.

The defense was that the whiskey was never introduced, and was not intended to be introduced into any Indian country, but was located and seized at Crookston, in an organized county of the State, and that such county did not even adjoin any Indian country. Hence it was claimed that the seizure was unlawful. The court decided, (1) that under the power to regulate commerce with the Indian tribes, Congress may not only prohibit the unlicensed sale of spirituous liquors in the Indian country, but may extend the prohibition to territory in proximity to that occupied by the Indians, and (2) that it is competent for the United States, in the exercise of the treaty-making power, to stipulate in a treaty with an Indian tribe, that within the territory thereby ceded the laws of the United States then in force, or thereafter to be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect, until otherwise directed by Congress or by the President of the United States, and (3) that such a stipulation operates *proprio vigore*, and is binding upon the courts, although the ceded territory is situated within an organized county of a State.

In Beecher vs. Wetherby (95 U. S., 517) it was decided to be an unalterable condition of the admission of Wisconsin into the Union that, of the public lands in the State, Section 16, in every township, which had not been sold, or otherwise disposed of, should be granted to the State for the use of schools. In the opinion in that case, after stating that the

logs were cut from a certain Section 16, and that the State asserted title to the land from which they had been cut, under the compact upon which it had been admitted into the Union, and referring to the Act of Congress authorizing the people of the Territory to organize a State government, and stating some of its provisions, and the fact that the convention of the people when assembled accepted the propositions contained in the act of Congress, and ratified them by an article in the constitution, and referring to the later act admitting the State into the Union, Justice Field said: "It was therefore an unalterable condition of the admission, obligatory upon the United States, that Section 16, in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States and constituting only a pledge of a grant in future, or as operating to transfer the title to the State, upon her acceptance of the propositions, as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys, or if any other assurance of title was required to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from the appropriation to the State." (95 U. S., 523-524.)

Cooper vs. Roberts (18 Howard, 173,) arose in the State of Michigan, and involved a 16th section of a township in that State for the use of schools, as set apart by the compact between Michigan and the United States when Michigan was admitted as a State of the Union.

The validity and effect of the compact upon the title to the 16th sections was admitted and sustained in the opinion. Justice Campbell in the opinion traced the practice of setting

apart that particular section for the maintenance of public schools, to the Ordinance of Congress of 1785, being the first enactment for the disposal by sale of the public lands in the Western Territory. He said that the appropriation of public lands for the maintenance of public schools became a fundamental principle by the Ordinance of 1787, for the government of the Northwest Territory, which settled the terms of compact between the people of the Territory and the original States, and made them unalterable except by consent. (18 Howard, 177.)

He then referred to the compact between the United States and Georgia, in the cession by Georgia of the Southwestern Territory, as containing a similar provision. And in this connection, he stated that similar paramount obligations had arisen in treaties with the Indian tribes who inhabited that territory. He said: "The rights of private property, vested in the inhabitants, ceded with Louisiana and Florida, and guaranteed to them in the treaties of cession, created an obstruction to the same policy within them. But the constancy with which the United States have adhered to the policy in the various compacts with the people of the newly formed States, and the care which Congress has manifested to prevent the accumulation of prior obligations which might interrupt it, fully display their estimate of its value and importance." (18 Howard, 178.)

Then stating the fact that until the survey of the township and the designation of the specific section, the right of the State to every 16th section rested in the compact, binding the public faith, and dependent for execution upon the political authorities, and that courts of justice had no authority to mark out and define the land subject to the grant, he said further: "But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title. The *jus ad rem*, by the performance of that executive act, becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others," (18 Howard, 179.)

The result of the case was that the title of Michigan to the 16th section, under the compact, was sustained, as against an asserted title, set up as resting upon other legislation, in-

consistent with the provisions of the compact, and sales and conveyances under such legislation.

In Fort Leavenworth Railroad Co. vs. Lowe (114 U. S., 525), where the effect of a cession of a tract of land within a State by the State to the United States was involved, Justice Field said, in answering the objection that the Legislature of a State has no power to cede away her jurisdiction and legislative power over any portion of her territory: "In their relations to the General Government, the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the General Government are essentially different from those of the State, they are not those of a different country, and the two—the State and General Government—may deal with each other in any way they may deem best to carry out the purposes of the Constitution. It is for the protection and interest of the States, their people and property, as well as for the protection and interest of the people generally of the United States, that forts, arsenals and other buildings for public uses are constructed within the States." (114 U. S., 541.)

In Stearns vs. Minnesota (179 U. S., 223) the effect of the legislation, State and national, admitting Minnesota as a State of the Union, was in question, and particularly the provision in the constitution of the State, passed in accordance with the act of Congress, making propositions upon which the State would be admitted, accepting those propositions, and declaring: "It is hereby ordained that this State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title to said soil to *bona fide* purchasers thereof, and no taxes shall be imposed on lands belonging to the United States, and in no case shall non-resident proprietors be taxed higher than resident." In the opinion in that case, Justice Brewer said: "That this provision of the enabling act and the Constitution, in form at least, made a compact between the United States and the State, is evident." Then pointing out that a distinction is to be taken between agreements or compacts between two States, or between a State and the nation, having reference to political rights and obligations, and others solely in reference to property, belonging to one or the other, and that different consid-

erations may underlie the question as to the validity of these two kinds of compacts or agreements, and that a State admitted, enters the Union in full equality with the others, and that such equality may forbid any agreement or compact limiting or qualifying political rights or obligations, while a mere agreement in reference to property involves no question of equality among the States, but only the power of a State to deal with another State, or with the nation, with reference to such property, Justice Brewer said further: "The case before us is one involving simply an agreement as to property between a State and the Nation. That a State and the Nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this court, and that they have been frequently made in the admission of new States, as well as subsequently thereto, is a matter of history." (179 U. S., 245.) The Justice then referred to Section 10, Article 1, of the Constitution, and said further: "It was early ruled that these negative words carried with them no denial of the power of two States to enter into a compact or agreement with one another, but only placed a condition upon the exercise of such power." Green vs. Biddle (8 Wheaton, 1), and Pool vs. Fleeger (11 Peters, 185), were then referred to, and what Justice Story said in the latter case (11 Peters, 209) was quoted. (179 U. S., p. 245.)

Justice Brewer then referred to Virginia vs. Tennessee (148 U. S., 503), and quoted from the opinion in that case (page 518) to show what agreements States may enter into between themselves, and those which they cannot enter into without the consent of Congress. (See quotation, 179 U. S., 246-248.) At the conclusion of the quotation, Justice Brewer said further: "If as 'a part of the general right of sovereignty' to which Mr. Justice Story refers in the quotation above made, the right of agreement between one another belongs to the several States, except as limited by the constitutional provisions requiring the consent of Congress, equally true is it that a State may make a compact with all the States, constituting as one body the nation, possessed of general rights of sovereignty and represented by Congress." (179 U. S., 248.)

After referring to Article 1, Section 8, of the Constitution, and the act of the Kansas Legislature making the cession

in question in the case of Fort Leavenworth Railroad Co. vs. Lowe (114 U. S., 525), and quoting from the opinion in that case, and also referring to the act of Congress admitting Kansas into the Union (12 Statutes at Large, U. S., 127), and the Kansas Indians (5 Wallace, 737), and quoting from the opinion in that case (page 757), and also referring to Beecher vs. Wetherby (95 U. S., 517-523), Justice Brewer said further: "But we need not go outside of the present case. The State of Minnesota accepted the trust created by the act of Congress. Acceptance by a trustee of the obligations created by the donor of a trust completes a contract. Such contracts, as we have seen, have been frequent in the history of the Nation, and their validity has not only never been questioned, but has been directly affirmed. Tucker vs. Ferguson, 22 Wallace, 527." (179 U. S., 249-250.) And see Wharton vs. Wise, 153 U. S., 155, 166-173.

The question in Pollard vs. Hagan (3 Howard, 212) was, whether or not the United States, by virtue of its ownership of the public lands in Alabama, had the right to grant land below the actual high water mark in a navigable water of the State. (3 Howard, 220.) The cause of action seems to have arisen in the territory ceded to the United States by Georgia, or in the Territory of Florida, ceded by Spain, and not in the Louisiana Territory. The United States acquired the territory by a deed of cession made by Georgia on the 24th day of April, 1802, or else a treaty made with Spain on the 22nd of February, 1819. (8 Statutes at Large, U. S., 252.) The deed was similar to the deed Virginia made on the 1st day of March, 1784, ceding the territory northwest of the Ohio. Both deeds conveyed the title to the soil and the jurisdiction, and annexed the condition that the territory should be formed into States, having Republican forms of government, with the right to be admitted as members of the Federal Union on an equality with the other States. The deed of Georgia referred to the Ordinance of Congress of the 13th of July, 1787, for the government of the Northwest Territory, and declared that the State to be formed should be admitted into the Union on the same conditions and restrictions, with the same privileges, and in the same manner, as provided in that ordinance, and that the ordinance in all its parts, except as to slavery, should extend to the territory ceded. Before Georgia made the deed of cession, Congress, by the Act of the

7th of April, 1798, had established the Mississippi Territory, extending from the Chattahoochee River to the Mississippi River, above the 31st degree of north latitude, and below the Yazoo River, and had extended the Ordinance of July 13, 1787, for the government of the Northwest Territory to that territory. (3 Howard, 220, 221-222, 226.)

The question of fact in the case was whether or not the land in controversy was a part of the public lands, when the United States acquired the territory, or then constituted the soil under a navigable water within the territory. If the land was part of the public land, it was conceded to be subject to grant by the United States. If it was a part of the soil of a navigable water, then all the judges seem to have agreed it could not be granted. The majority of the court held that the land was a part of the soil of a navigable water, and so that the United States had no authority to pass the title by a grant. (See Martin vs. Waddell, 16 Peters, 412, etc.)

Justice McKinley, in his opinion, said that the declaration contained in the compact, entered into between the United States and Alabama, when Alabama was admitted into the Union, "that all navigable waters within the said State shall forever remain public highways, free to the citizens of the said State and of the United States, without any tax, duty, impost or toll therefor, imposed by the said State," would be void, if inconsistent with the Constitution of the United States. (3 Howard, 229.) He proceeded: "But is this provision repugnant to the Constitution? By the 8th section of the 1st article of the Constitution, power is granted to Congress to regulate commerce with foreign nations and among the several States. If, in the exercise of this power, Congress can impose the same restrictions upon the original States, in relation to their navigable waters, as are imposed by this article of the compact on the State of Alabama, then this article is a mere regulation of commerce among the several States according to the Constitution, and therefore as binding on the other States as Alabama." (3 Howard, 229.)

After referring to Gibbons vs. Ogden (9 Wheaton, 196) and quoting Chief Justice Marshall's definition of the power to regulate commerce, Justice McKinley said further: "As the provision of what is called the compact between the United States and the State of Alabama does not, by the above reason-

ing, exceed the power thereby conceded to Congress over the original States on the same subject, no power or right was by the compact intended to be reserved by the United States, nor to be granted to them by Alabama. This supposed compact is, therefore, nothing more than a regulation of commerce to that extent, among the several States, and can have no controlling influence in the decision of the case before us." (3 Howard, 230.)

In the concurring opinion of Justices White, Shiras and McKenna, in Downes vs. Bidwell (182 U. S., 320) it was stated that the opinion had been expressed that the Ordinance of 1787 for the government of the Northwest Territory became inoperative and a nullity on the adoption of the Constitution, and also that it had been classed in judicial opinions as one of the most solemn of all engagements, and as having become a part of the Constitution of the United States by reason of the 6th article, which provides, "That all debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation." (182 U. S., 220.)

Here the concurring opinion of Baldwin, Justice, in Pollard vs. Kibbe (14 Peters, 417), and the dissenting opinion of Catron, Justice, in Strader vs. Graham (10 Howard, 98), were referred to. After the reference, the opinion continues: "Whatever view may be taken of this difference of legal opinion, my mind refuses to assent to the conclusion, that under the Constitution, the provision of the Northwest Territory Ordinance, making such territory forever a part of the Confederation, was not binding on the government of the United States, when the Constitution was formed. When it is borne in mind that large tracts of this territory were reserved for distribution among the Continental soldiers, it is impossible for me to believe that it was ever considered that the result of the cession was to take the Northwest Territory out of the Union, the necessary effect of which would have been to expatriate the very men who by their sufferings and valor had secured the liberty of their united country.

"Can it be conceived that North Carolina, after the adoption of the Constitution, would cede to the General Govern-

ment the territory south of the Ohio River, intending thereby to expatriate those dauntless mountaineers of North Carolina who had shed luster upon the Revolutionary arms by the victory of King's Mountain? And the rights bestowed by Congress after the adoption of the Constitution, as I shall proceed to demonstrate, were utterly incompatible with such a theory. Beyond question, in one of the early laws, enacted at the first session of the first Congress, the binding force of the ordinance was recognized and certain of its provisions, concerning the appointment of officers in the Territory, were amended to conform the ordinance to the new Constitution. (Chap. 8, 1 U. S. Statutes at Large, p. 50, Act of August 7th, 1789.) In view of this, it cannot, it seems to me, be doubted, that the United States continued to be composed of States and Territories, all forming an integral part thereof, and incorporated therein, as was the case prior to the adoption of the Constitution. Subsequently, the territory now embraced in the State of Tennessee, was ceded to the United States by North Carolina. In order to insure the rights of the native inhabitants, it was expressly stipulated that the inhabitants of the ceded territory should enjoy all the rights, privileges, benefits and advantages set forth in the ordinance 'of the late Congress for the government of the Northwest Territory of the United States.' A condition was, however, inserted in the cession, that no regulation should be made by Congress tending to emancipate slaves. By the Act of April 2nd, 1790 (1 U. S. Statutes at Large, Chap. 6, p. 106), this cession was accepted. And at the same session, on May 26, 1790, an act was passed for the government of this territory, under the designation of 'the territory of the United States south of the Ohio River.' (1 U. S. Statutes at Large, Chap. 14, p. 123.) This act, except as to the prohibition, which was found in the Northwestern Territory Ordinance, as to slavery, in express terms declared that the inhabitants of the territory should enjoy all the rights conferred by that ordinance." (182 U. S., 321-322.) Thus the compact entered into between North Carolina and the United States, before Tennessee was admitted as a State, and when the United States acquired the Territory, extending the Ordinance of 1787, including the provision as to navigable waters, to Tennessee, has been recognized by this court.

In Permoli vs. Municipality No. 1 (3 Howard, 589) an ordinance of the City of New Orleans imposed a penalty upon

any priest who should officiate at any funeral in any church other than the Obituary Chapel. Permoli was arrested for that offense. He defended on the ground that the Act of Congress of March 2nd, 1805 (2 U. S. Statutes at Large, 322), granted to the inhabitants of the Territory of Orleans the rights secured to the people of the Northwestern Territory by the Ordinance of 1787, so far as the same had been conferred on the people of the Mississippi Territory. He was convicted in the State court, including the Supreme Court of Louisiana, and in the Supreme Court of the United States his writ of error was dismissed for want of jurisdiction over the controversy in that way, in that court. The court decided that the right to religious liberty was political, and that it ceased to depend on the act of Congress, or the Ordinance of 1787 when the State was admitted to the Union, and that if it existed after that occurrence, it was under the constitution of the State. Delivering the opinion, Justice Catron said that the court had no jurisdiction over the case unless the city ordinance complained of violated the Constitution or the laws of the United States, or some authority exercised under them. He then said that the Constitution of the United States made no provision for protecting the citizens of the States in their religious liberties, and contained no inhibition on the subject on the States. Referring to the Act of Congress of the 20th of February, 1811, authorizing the people of the Territory of Orleans to form a constitution and State government, and the Act of April 8th, 1812, admitting the State of Louisiana as a State, he said that all those statutes meant was to declare in advance to the people of the Territory what fundamental principles their constitution should contain, and then to accept the constitution made as a compliance with the requirement, and to admit the State as having the requisite constitution on an equal footing with the original States in all respects whatever.

He said further that no fundamental principles after the admission of the State could be added by way of amendment, as that would have been the making by Congress of a part of the State constitution; that the acts of Congress providing for organizing a territorial government, and the Ordinance of 1787 standing in connection with them, were superseded by the constitution of the State *so far as they conferred political rights, and secured civil and religious liberties;* that it was not

possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all the great elemental principles, or any of them, contained in the ordinance, and secured to the people of the Territory during its existence; but, he said: "The conditions and terms, referred to in the Act of 1812, could only relate to the stipulations contained in the second proviso of the Act of 1811, involving rights of property and navigation, and, in our opinion, were not otherwise intended." (3 Howard, 610.)

This last declaration, it seems to us, shows that Justice Catron and the court distinguished between the political rights and civil liberties he mentioned, and such as Permoli sought to vindicate in the suit, on the one side, and the rights of property in the navigation and use of the Mississippi River and its tributaries, as vested by the ordinance and the Acts of Congress of 1811 and 1812, admitting Louisiana as a State, in the inhabitants and in citizens of the United States, on the other.

And see in this connection Cummings vs. The State of Missouri, 4 Wallace, 277.

The case of Scott vs. Sanford (19 Howard, 452), involved the Ordinance of 1787 for the government of the Northwest Territory, and also the Act of Congress of the 6th of March, 1820 (3 Statutes at Large, U. S., p. 545), admitting Missouri into the Union, and may be classed along with such cases as Strader vs. Graham. While it has frequently been referred to in this court, such references have been incidental only, or by way of expressing dissent from some of its doctrines, and if on any occasion the court has approved the case as a whole, as an authoritative decision, we are not aware of it.

Justice Brown said of the case, in his opinion in Downes vs. Bidwell, that the question to be decided was whether a negro, whose ancestors were imported into this country and sold as slaves, became a member of the political community, formed and brought into existence by the Constitution of the United States, and as such entitled to all the rights and privileges and immunities guaranteed by that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States. He said further, substantially, that the decision that Scott, though possessing the rights and priv-

ileges of a citizen of a State, must also be a citizen of the United States, and he could not be a citizen of the United States because the African race was not intended to be included within the political community created by the Constitution of the United States, and that a State could not create a citizen of the United States, which prevented Scott's suing in a court of the United States, precluded the decision of any other question in the case. He said also, that the decision of the question whether Scott, a slave, by having been taken by his owner from Missouri to Illinois and Minnesota, and kept there four years, did or did not become free, and upon his return to Missouri, did or did not remain a slave, which were the questions on the merits, could not properly be decided because of the decision as to Scott's citizenship. His language, in this connection, is: "We are not, however, bound to overlook the fact that before the Chief Justice gave utterance to his opinion upon the merits, he had already disposed of the case adversely to the plaintiff upon the question of jurisdiction, and that in view of the excited political condition of the country at the time, it is unfortunate that he felt compelled to discuss the question upon the merits, particularly so, in view of the fact that it involved a ruling that an act of Congress, which had been acquiesced in for thirty years, was (declared) unconstitutional." (182 U. S., 274.)

The case of Strader vs. Graham (10 Howard, 82) involved only that portion of the Ordinance of 1787 for the government of the Northwest Territory, which declared that slavery was prohibited in the ceded territory. The constitution of Ohio contained the same provision, and the case proceeded on the idea that the cause of action arose in Ohio, or, at least, depended on its laws. Chief Justice Taney said in the opinion in that case, that the question whether the negroes were slaves was not before the court. Continuing, he said, further: "Every State has an undoubted right to determine the *status* or domestic and social condition of the persons domiciled within its territory, except in so far as the powers of the State in this respect are restrained, or duties and obligations imposed upon them by the Constitution of the United States." (10 Howard, 93.)

When the court decided in that case that the constitution of Ohio and not the Ordinance of 1787 was the law which de-

termined whether or not the negroes were slaves, it necessarily decided also that the case presented no question of which the Supreme Court of the United States could take jurisdiction under the 25th section of the Judiciary Act of 1789. (10 Howard, 97.) It therefore dismissed the suit for that reason. Justice McLean, in his concurring opinion, after stating the case, said: "This, in my judgment, decides the question of jurisdiction, which is the only one before us. And anything that is said in the opinion of the court in relation to the ordinance beyond this, is not in the case, and consequently extra-judicial." (10 Howard, 97.) Justice Catron was even more explicit. He had delivered the opinion in Permoli vs. Municipality No. 1 (3 Howard, 589), and the dissenting opinion in Pollard vs. Hagan (3 Howard, 230). After saying that when the constitution of the State of Ohio was assented to by Congress, and that constitution incorporated the first part of the 6th article of the Ordinance of 1787, but left out the second part, that the alteration was made with the consent of both the United States and Ohio; that the ordinance was an engagement entered into before the adoption of the Constitution, and under its 6th article was equally as binding on one Congress as on another, and that any Congress had power to consent to the alterations; that the power to alter involved the power to annul or suspend, and when the constitution of Ohion was assented to by Congress the 6th article of the ordinance stood suspended or abolished as an engagement among the States, and could then only be recognized as part of the organic law of Ohio, and as only that law was drawn in question in the suit, no jurisdiction existed to examine the decision of the Court of Appeals of Kentucky on the writ of error, he said further: "But, in regard to parts of the other five articles, I am unwilling to express any opinion, as no part of either is in any degree involved in this controversy. The 4th article secured the free navigation of the waters leading into the Rivers Mississippi and St. Lawrence, and the carrying places between them, as common highways, and exempted them from tax, impost or duty. The mouths of the two great rivers were in possession of foreign powers, and closed to our commerce at the date of the ordinance and Constitution, and therefore it was more necessary that the tributaries should be always open and the carrying places free, so that the Ohio and St. Lawrence could be reached from the Great Lakes, and

back and forth either way. Some of these tributary rivers and the carrying places, it was known, would fall into a single new State as contemplated by the ordinance. This is true of every carrying place, and is equally true as respects most of the rivers leading to the carrying places, and as Congress had only power given by the new Constitution to regulate commerce among the States, it is a question now unsettled whether such inland rivers and carrying places could be regulated where the navigation and carrying places began and ended in a single State. For thirty years the State courts within the territory ceded by Virginia have held this part of the 4th article to be in force and binding on them respectively, and I feel unwilling to disturb this wholesome course of decision, which is so conservative to the rights of others in a case where the 4th article is in no wise involved, and when our opinion might be disregarded by the State courts as *obiter* and a *dictum* uncalled for. When the question arises here on the 4th article, it is desired by me that no such embarrassment should be imposed on this court as necessarily must be by now passing judgment on the force of the 4th article, and pronouncing that it stands superseded and annulled." (10 Howard, 98-99.)

In Hogg vs. Zanesville Canal Manufacturing Co., 5 Ohio (Hammond), 410 (1832), it was held that the provision of the Ordinance of 1787, that navigable waters of the Territory should be common highways and forever free, was permanent in its obligation, and applied to the Muskingum River within that State, and could not be altered without the consent both of the people of the State and of the United States, given through their representatives. The court said: "It is an article of compact, and until we assume the principle that the sovereign power of a State is not bound by compact, this clause must be considered obligatory." Justice McLean and Judge Leavitt examined the question very fully in Spooner vs. McConnell (1 McLean, 337), and they arrived at the same conclusion as the Supreme Court of Ohio, and referred to the case decided by that court. Speaking of the Ordinance of 1787, Justice McLean said, in substance, that the compact had in it six articles, some of them temporary, and some unalterable, except by consent. He said that those guarantees in the Ordinance of 1787, which were contained in the Federal Constitution had been practically annulled, and that those con-

tained in the constitution of Ohio had been changed by common consent, because both the United States and Ohio had agreed to the constitution of Ohio. He said the article respecting the navigable waters remained in full force without modification. The existence of that article was not incompatible with State sovereignty. Contracts are as obligatory upon States as upon individuals. At the same time, he concluded, as has frequently been held since, that the State of Ohio was not precluded from improving the navigable waters within its boundaries, by the Ordinance of 1787.

The same ruling, in substance, was made in Palmer vs. Commissioners (3 McLean, 226); Jolly vs. The Terre Haute Draw Bridge Co. (6 McLean, 237), and Columbus Ins. Co. vs. Curtenius (6 McLean, 209).

And see Columbus Ins. Co. vs. Peoria Bridge Co. (6 McLean, 70); Lewis vs. Baird (3 McLean, 56); Astron vs. Hammond (3 McLean, 107); Vaughan vs. Williams (3 McLean, 530); Jones vs. Van Zandt (2 McLean, 611); Cox vs. The State (3 Blackford (Ind.), 193); Connecticut Mut. Ins. Co. vs. Cross (18 Wisconsin, 109); Illinois River Packet Co. vs. Peoria Bridge Assn. (38 Ill., 467).

In the case last referred to Justice Breese said, referring to Article 4, of the Ordinance of 1787: "The meaning of this expression, 'shall be common highways and forever free,' is made very manifest by the concluding words, 'without any tax, impost or duty therefor.' This river (the Illinois) is a common highway, free to the Indian in his bark canoe and every other vessel floating upon the water, whether propelled by animal power, by the wind, or by the agency of steam. It is a common highway, free and so forever to remain, to all citizens of the United States, no matter where residing, not one of whom in the free use of it can be compelled under any pretext to pay any tax, impost or duty whatever therefor, nor against its use shall there be any obstruction." (38 Ill., 478.)

In almost all the States bordering the Mississippi River, or made out of the Northwest Territory, or the territory ceded by Georgia, similar decisions have been made. In Ohio, see Hutchinson vs. Thompson (9 Ohio, 52, 61-66). In Michigan, Moore vs. Sanborne (2 Michigan (Gibbs), 519, 525;

Benjamin vs. Manistee River Improvement Co. (42 Mich., 628, 633); Manistee River Improvement Co. vs. Sands (53 Mich., 593). In Wisconsin, Wisconsin River Improvement Co. vs. Lyons (30 Wis., 61, 66, etc.); Wisconsin River Improvement Co. vs. Manson (43 Wis., 255, 262, etc.); Sweeney vs. Chicago, Milwaukee & St. Paul Railway Co. (60 Wis., 60, 67, etc.); J. S. Keastor Lumber Co. vs. St. Croix Boom Corporation (72 Wis., 62, 80, etc.). In Illinois, Illinois River Packet Co. vs. Peoria Bridge Association (38 Ill., 478-482); Chicago vs. McGinn (51 Ill., 266, 270, etc.); Mississippi River Bridge Co. vs. Lonergan (91 Ill., 508, 515). In Indiana, Cox vs. The State (3 Blackford, 193); Williams vs. Beardsley (2 Ind., 591); Neaderhauser vs. The State (28 Ind., 257, 266). In Alabama, Mobile vs. Eslava (9 Porter, 577, 598); Peters vs. New Orleans Railroad Co. (56 Ala., 528, 535). In Mississippi, Commissioners vs. Withers (29 Miss., 38-40).

All these decisions recognized the provision in the Ordinance of 1787, that the navigable waters should be free, without any tax, duty, toll or impost, to all the people, as the organic law. Not one of them intimated that any State could tax the use of any navigable water in its natural state. Many of them declared that no such thing could be done, and, while many of them stated or assumed that the provision of the ordinance, as to the free use of navigable waters, had been suspended, or superseded, or displaced, they all assumed that some law, the equivalent of that provision of that ordinance, was still in force, and the supreme law, and that the only qualification of it was that the States, respectively, in the exercise of their power to regulate internal commerce, or Congress in regulating interstate or foreign commerce, had the power and right to legislate for the improvement of the natural water courses, and, in doing so, to interrupt all such water courses temporarily, or partially, for the purpose of such internal, or interstate or foreign commerce, and to allow or make a charge of toll for the use of the improvements made. All of them held, impliedly, at least, that no charge could be made for the use of the natural water way.

The case of Harman vs. Chicago (147 U. S., 396) proceeds on those ideas. There the case of Huse vs. Glover was referred to and stated, and a quotation made from the opinion,

and the case distinguished from the case before the court. The court, after saying that in Huse vs. Glover the navigation of the river was improved and facilitated, and that those benefited were required to pay therefor, said further: "Nothing of this kind is mentioned for consideration in the ordinance of Chicago. The license fee is a tax for the use of the navigable waters, not a charge by way of compensation for any specific improvement. The grant to the city, under which the ordinance was passed, is a general one to all municipalities of the State. Waters navigable in themselves, in a State, and connecting with other navigable waters, so as to form a water way to other States or foreign nations, cannot be obstructed or impeded so as to impair or defeat or place any burden upon a right to their navigation, granted by Congress. Such right the defendants had from the fact that their steam barges and tow boats were enrolled and licensed, as stated, under the laws of the United States." (147 U. S., 411-412.)

In Withers vs. Buckley (20 Howard, 92) Justice Daniel, in passing on the question whether the law of Mississippi, of the 5th of March, 1850, creating a Board of Commissioners of the Homochitto, for the purpose of improving the navigation of that river and of any outlet from the same to the Mississippi, and for other purposes, was a violation of the Act of Congress of the 1st of March, 1817, authorizing the people of the Mississippi Territory to form a constitution, which declared that the Mississippi River, and the navigable rivers and waters leading into the same, should be common highways, and forever free, as well to the inhabitants of the State as to the other citizens of the United States, said: "In considering this Act of Congress of March 1st, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning or operation, or binding authority, further than to affirm that it could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfect equality with the other members of the Confederacy, with which it was to be associated. These conclusions follow from the very nature and objects of the Confederacy, from the language of the constitution adopted by the States, and from the rule of interpretation pronounced by this court in the case of Pollard vs. Hagan (3 Howard, 223). The Act of Congress of March 1st, 1817, in prescribing the free navigation of the Mississippi and

the navigable waters flowing into this river, could not have been designed to inhibit the power inseparable from every sovereign or efficient government to devise and to execute measures for the improvement of the State, although such measures might induce, or render necessary, changes in the channels or courses of rivers, within the interior of the State, or might be productive of a change in the value of private property." (20 Howard, 92.)

The same principle, in substance, had been acted on in the case of City of Georgetown vs: The Alexandria Canal Co. (12 Peters, 91, 96-98.)

In the Packet Co. vs. Keokuk (95 U. S., 80) only the right to charge wharfage was involved. The court, in its opinion, made clear the distinction between such a charge and a tax, duty, impost or toll, imposed by a State. It said: "If the charge is clearly a duty, a tax, or burden, which in its essence is a contribution claimed for the privilege of entering the port of Keokuk, or remaining in it, or departing from it, imposed as it is by the authority of the State, and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such a duty. But a charge for services rendered, or for conveniences provided, is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation. The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited—something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load, or unload, is rendering them a service." (95 U. S., 84-85.)

The case of the Ouachita Packet Co. vs. Aiken, 121 U. S., 444) is of the same character. It was a case where only wharfage was charged, and Congress had not undertaken to regulate the subject. The court quoted from Huse vs. Glover the statement that the terms, "tax, impost or duty," in the Ordinance of 1787, means a charge for the use of the government—not compensation for improvements. (121 U. S., 448-449.)

In The Transportation Co. vs. Parkersburg (107 U. S., 691) the authority of the City of Parkersburg to construct a wharf on the Ohio River, and charge wharfage for its use by steamboats navigating the river, was in question.

The right to construct the wharf and charge wharfage was sustained. Justice Bradley delivered the opinion, and referred to Pennsylvania vs. The Wheeling Bridge Co. (13 Howard, 518), and said it presented the case of interference with navigation, analogous to that of the exclusive monopoly granted to Fulton & Livingston by New York, involved in Gibbons vs. Ogden (9 Wheaton, 1). He said that the State of Pennsylvania being a party, the Supreme Court had original jurisdiction of the case, and that the court having jurisdiction on that ground, it was competent for it to decide on the lawfulness or unlawfulness of the structure, with reference not only to the laws of the United States, but also to the local municipal laws, and to the general laws relating to the mutual rights of the States. He referred to the charter granted to the Wheeling Bridge Company by Virginia, providing that if the bridge should be so constructed as to injure the navigation of the river, it should be treated as a public nuisance, and should be liable to abatement as other public nuisances, and then said: "In addition to this, an act was passed December 18th, 1789, by the State of Virginia, consenting to the erection of the State of Kentucky out of its territory, on certain conditions, among which was one 'that the use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States,' and to this the assent of Congress was given by the Act of February 4th, 1791, Chap. 4."

He quoted from the opinion in Pennsylvania vs. The Wheeling Bridge Co. the statement, "This compact, by the sanction of Congress, has become a law of the Union." He concluded, "Upon all these grounds it was held that the State of Pennsylvania, having large interests which were affected by the erection of the bridge, was entitled to a decree for its prostration as a nuisance, unless such alterations should be made in its construction as to leave the navigation of the river unimpaired." (107 U. S., 706.)

In Escanaba Co. vs. Chicago (107 U. S., 688) Justice Field copied from the clause of the 4th article of the Ordinance of 1787 for the government of the Northwest Territory, the portion relating to the navigable waters leading into the Mississippi and St. Lawrence, and stated the fact that the ordinance was passed nearly a year and eight months before the Constitution of the United States took effect. He stated that the ordinance appeared to have been treated as in force in the Territory, except as modified by Congress, and that by the act of Congress, creating the Territory of Indiana, and the act creating the Territory of Illinois, the rights granted by the ordinance were expressly secured to the inhabitants of those Territories. He said further that, although the Act of Congress of April 18th, 1818, enabling the people of Illinois Territory to form a constitution and State government, and the resolution of Congress of December 3rd, 1818, declaring the admission of the State into the Union, referred to the principles of the ordinance, according to which the constitution was to be formed, the provisions of the ordinance could not control the authority and powers of the State *after* her admission. And, in this connection, he said: "Whatever the limitations upon her powers as a government, whilst in a territorial condition, whether from the Ordinance of 1787, or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union."

Justice Field was not speaking, in this connection, of the vested rights of the inhabitants of the Territory, or of the citizens of the United States, to the use of the navigable waters, forever free, without any tax, impost or duty, but only of the powers and authority of the State of Illinois, assuming such powers were to be exercised by it as a sovereign, where there had been no surrender or extinguishment of them. The question before the court was whether or not the State of Illinois could authorize the improvement of the Chicago River, for the purposes of navigation, without infringing the rights secured to the inhabitants of the Territory, or the citizens of the United States, by the Ordinance of 1787, and it held that it could do so. He said the court did not see that the clause of the ordinance relied on, materially affected the question before the court. It contained two provisions: (1) That the navigable waters leading into the Mississippi and the St. Lawrence

should be common highways to the inhabitants, and (2) that they should be forever free to them, without any tax, impost or duty therefor. He then continued: "The navigation of the Illinois River is free, so far as we are informed, from any tax, impost or duty, and its character as a common highway is not affected by the fact that it is crossed by bridges. All highways, whether by land or water, are subject to such crossings as the public necessities and conveniences may require, and their character, as such, is not changed if the crossings are allowed, under reasonable conditions, and not so as to needlessly obstruct the use of the highways. In the sense in which the terms are used by publicists and statesmen, free navigation is consistent with ferries and bridges across a river for the transit of persons and merchandise, as the necessities and convenience of the community may require."

There was a provision in the act of Congress admitting California into the Union, having reference to the navigable waters within the State, similar to the provision in the Ordinance of 1787, and that provision was in question in Cardwell vs. The American Bridge Co. (113 U. S., 205), in which Justice Field also delivered the opinion.

He referred to the case of Pound vs. Turck (95 U. S., 459), and also to the case of Escanaba Co. vs. Chicago, and to the fact that the court in the latter case held that the bridges across the Chicago River, having draws for the passage of vessels, could not be regarded as an obstruction to the navigation, within the Ordinance of 1787, and then said: "We were not required to express any further opinion as to the meaning of the ordinance. But upon the mature and careful consideration which we have given in this case, to the language of the clause in the act admitting California, we are of the opinion that if we treat the clause as divisible into two provisions, they must be construed together as having but one object, namely, to insure a highway, equally open to all, without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties, to the exclusion of the public, and the exaction of any toll for their navigation, and that the clause contemplated no other restrictions upon the power of the State in authorizing the construction of bridges over them, whenever such construction would promote the convenience of the public." (113 U. S., p. 212.)

This declaration has been reiterated several times in the opinions of the court, and must be final. The substance of it is, the compacts made when admitting States to the Union, such as that made in admitting California, do not restrict the power of the State to improve the navigable waters in the State for the purposes of navigation, or commerce, or the power to authorize the construction of bridges over them, but do preserve and insure such navigable waters as highways, equally open to all, without preference to any, free from the exaction of duties or tolls for their use.

In Huse vs. Glover (119 U. S., 543) it was held that the provision in the Ordinance of 1787, that the navigable waters leading into the Mississippi and the St. Lawrence shall be common highways, forever free, without tax, impost or duty therefor, refers to rivers in their natural state, and did not prevent the State of Illinois from improving the navigation of such waters within its limits, nor from charging and collecting reasonable tolls from vessels using the artificial improvements, as compensation for the use of those facilities. The cases of Escanaba Co. vs. Chicago (107 U. S., 687), Cardwell vs. The American Bridge Co. (113 U. S., 205), and Hamilton vs. The Vicksburg, Shreveport and Pacific R. R. (119 U. S., 280), were all referred to, and reconciled with the doctrine just stated. The court also announced in that case the same doctrine which had been established in Gilman vs. Philadelphia (3 Wallace, 713), that if, in the opinion of a State, its commerce will be more benefited by improving a navigable stream within its borders than by leaving the same in its natural state, it may authorize the improvement, although increased inconvenience and expense may thereby attend the business of individuals.

In the opinion, the court said: "The exaction of tolls for passage through the locks, is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways, without any tax, impost or duty, has reference to their navigation in their natural state." (119 U. S., 548.) And again the court said: "By the terms, 'tax, impost and duty,' mentioned in the ordinance, is meant a charge for the use of the government, not compensation for improvements." (119 U. S., 549.)

In Harman vs. Chicago (147 U. S., 409-411) the court reviewed Huse vs. Glover, and quoted a part of the opinion, and then said: "That case differs essentially from the one before us. It pointed out distinctly the nature of the improvement, the benefit which it extended to vessels was readily perceptible and no principle was violated, and no control of Congress over commerce, interstate or foreign, was impaired thereby. Congress, by its contribution to the work, had assented to it. The navigation of the river was improved and facilitated, and those thus benefited were required to pay a reasonable toll for the increased facilities afforded." (147 U. S., 411.)

In Hatch vs. Willamet Iron Bridge Co. (6 Fed. Rep., 326), opinion by Judge Deady, and (6 Fed. Rep., 780), opinions by both Judge Deady and Judge Sawyer, and Willamet Bridge Co vs. Hatch (bill of review — 19 Fed. Rep., 347), opinion by Judge Deady, the provision in the Act of Congress of 14th of February, 1859 (11 U. S. Statutes at Large, 383), admitting Oregon into the Union as a State, and declaring that all the navigable waters of the State shall be common highways and forever free, as well to the inhabitants of the State as to all the other citizens of the United States, without any tax, duty, toll or impost therefor, was held to be paramount to a law of the State authorizing a bridge to be erected across the Willamet River, wholly in Oregon, materially impeding or obstructing the free navigation of that river, and the erection of the bridge was enjoined. In the opinions the question of the effect as to the navigable waters, of the provision, was fully and ably examined.

It is true that this court reversed the decree rendered, in Willamet Iron Bridge Co. vs. Hatch (the bill of review—125 U. S., 1), but it did so on the ground that in the absence of legislation by Congress a State, in the exercise of its power to regulate commerce wholly internal, may authorize a navigable stream within its limits to be obstructed by a bridge or highway, and that the courts of the United States have no jurisdiction to remove it, and that the provision as to navigable waters in the act admitting Oregon, did not refer to physical obstructions of the navigable waters of the State, but to political regulations which would hamper the freedom of commerce.

In Willamet Iron Bridge Co. vs. Hatch (125 U. S., 9), just referred to, Justice Bradley said: "This court has held that when any new State was admitted into the Union from the Northwest Territory, the ordinance in question (1787) ceased to have any operative force in limiting its *powers of legislation* as compared with those possessed by the original States. On the admission of any such new State, it at once became entitled to and possessed all the rights of *dominion and sovereignty* which belonged to them."

Then referring to the provisions in the acts of Congress, admitting some of the new States, having reference to the navigable waters within them, and stating that it had been supposed that that form of enactment might be regarded as a regulation of commerce, which Congress had the right to impose, he said that, conceding that view to be correct, the question arose, What was the fair construction of the enactment? Did it prohibit physical obstructions and impediments to the navigation of the stream, or did it prohibit only the imposition of duties for the use of the navigation, and any discriminaton denying to citizens of other States the equal right to such use? and said in answer that that question had been before the court and had been decided in favor of the latter construction. (125 U. S., p. 10.)

He then referred to Pound vs. Turck (95 U. S., 459); Cardwell vs. The American Bridge Co. (113 U. S., 205), and Hamilton vs. Vicksburg Railroad Co. (119 U. S., 280), and quoted what was said in Cardwell vs. The American Bridge Co. as follows "Upon the mature and careful consideration which we have given in this case to the language of the clause in the act admitting California, we are of opinion that if we treat the clause as divisible into two provisions, they must be construed together as having but one object, namely, to insure a highway equally open to all, without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation, and that the clause contemplated no other restriction upon the power of the State in authorizing the construction of bridges over them, whenever such construction would promote the convenience of the public." (125 U. S., 11.)

He continued: "It seems clear, therefore, that according to the construction given by this court to the clause in the act

of Congress relied upon by the court below, it does not refer to physical obstructions, but to political regulations which would hamper the freedom of commerce. * * * What the people of the old States wished to secure, was the free use of the streams and carrying places in the Northwest Territory as fully as it might be enjoyed by the inhabitants of that Territory themselves, without any impost or discriminating burden." (125 U. S., p. 12.)

Later on in the opinion, referring to the Wheeling Bridge case (13 Howard, 518), he said in that case the court had original jurisdiction, Pennsylvania being a party, and entitled to invoke, and the court having the power to apply any law applicable to the case, whether a State law, a Federal law or an international law. He continued: "The bridge had been authorized by the Legislature of Virginia, whose jurisdiction extended across the whole River Ohio, but Virginia in consenting to the erection of Kentucky into a State, had entered into a compact with regard to the free navigation of the Ohio, confirmed by the act of Congress admitting Kentucky into the Union, which the court held to be violated by authorizing the bridge to be constructed in the manner it was, and the bridge so constructed injuriously affecting a supra-riparian State (Pennsylvania), bordering on the river, contrary to international law." (125 U. S., 15-16.)

Here Justice Bradley quoted what Justice Grier said in the Passaic Bridge Cases (3 Wallace, 792), which we have quoted elsewhere. (125 U. S., 16-17.) In conclusion, he said: "This exposition of the Wheeling Bridge case, by one who had taken a decided part in its discussion and determination effectually disposes of it as a precedent for the jurisdiction of the Circuit Court of the United States in matters pertaining to bridges erected over navigable rivers, at least those erected over rivers whose course is wholly within a single State. The Willamet River is one of that description. On the whole, our opinion is, that the original suit in this case was not a suit arising under any law of the United States, and since on such ground alone the court below could have had jurisdiction of it, it follows that the decree on the bill of review must be reversed." (125 U. S., 17.)

There is nothing, therefore, in the case of the Willamet Bridge Co. vs. Hatch, in conflict with what we claim for Fop-

piano in this case. As shown elsewhere, there is no question of jurisdiction involved here. And the opinion in Willamet Bridge Co. vs. Hatch concedes or assumes that the imposition of duties for the use, or the navigation of the river was prohibited by the act of Congress admitting Oregon as a State.

In Sands vs. The Manistee River Improvement Co. (123 U. S., 288) the question was whether or not the State of Michigan, by a statute, could authorize the exaction of tolls for the use of an improvement in the natural water way of the Manistee River, which is wholly within the limits of Michigan. Justice Field said, in that case, in his opinion: "There is no contract in the fourth article of the Ordinance of 1787 respecting the freedom of the navigable waters of the territory northwest of the Ohio River emptying into the St. Lawrence which bound the people of the territory, or any portion of it, when subsequently formed into a State and admitted into the Union. The Ordinance of 1787 was passed a year and some months before the Constitution of the United States went into operation. Its framers, and the Congress of the Confederation, which passed it, evidently considered that the principles and declaration of rights and privileges expressed in its articles, would always be of binding obligation upon the people of the territory. The ordinance, in terms, ordains and declares that its articles shall be considered as articles of compact between the original States and the people and States in said territories, and forever remain unalterable unless by common consent; and, for many years after the adoption of the Constitution, its provisions were treated by various acts of Congress as in force except as modified by such acts. In some of the acts organizing portions of the territory under separate territorial governments, it is declared that the rights and privileges granted by the ordinance are secured to the inhabitants of those territories. Yet, from the very conditions on which the States formed out of that territory were admitted into the Union, the provisions of the ordinance became inoperative, except as adopted by them. All the States thus formed, were, in the language of the resolutions or acts of Congress, admitted into the Union on an equal footing with the original States in all respects whatever." (123 U. S., pp. 295-296.)

From what immediately follows in the opinion, it is manifest Justice Field was speaking only of the inalienable powers

of government, or sovereignty, belonging to the people of the State of Michigan, and not of such vested rights of property or rights in the nature of rights of property, as had resulted from the provisions of the ordinance, and had vested in the inhabitants and citizens, and had been guaranteed by the Constitution of the United States. And his remark as to the terms on which Michigan was admitted into the Union—that is, that she became entitled to, and possessed of, all the rights of sovereignty and dominion, which belonged to the original States—must be qualified in this case by the fact, that in the admission of each State made out of the Louisiana Territory, and of each State fronting on either side of the Mississippi River, it was expressly provided by Congress in the act of admission, that all the navigable waters of the State should be common highways, and forever free, as well to the inhabitants of the State, as to all the other citizens of the United States, without any tax, duty, impost or toll therefor. And Justice Field, in his opinion, after what we have referred to, stated: "But independent of these considerations, there is nothing in the language of the fourth article of the ordinance respecting the navigable waters of the Territory, emptying into the St. Lawrence, which, if binding upon the State, would prevent it from authorizing improvements made in the navigation of the Manistee River." And in this connection, he quoted from Huse vs. Glover (119 U. S., 548) the following: "The provision of the clause that the navigable streams shall be highways, without any tax, impost or duty, here refers to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works, the State may exact reasonable tolls." And again he quoted from the same case (page 549) the following: "By the terms, 'tax, impost and duty,' mentioned in the ordinance, is meant a charge for the use of the government, not compensation for the improvements." (123 U. S., 296-297.)

In Harman vs. Chicago the court distinguished the case of Sands vs. The Manistee River Improvement Company from that case. It said the Manistee River was wholly in Michigan, and its improvement consisted in the removal of obstruc-

tions to the floating of logs and lumber down stream; that the court held that the internal commerce of the State—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the General Government. It held further, that the States may provide for the removal of obstructions from their rivers and harbors, and deepening their channels and improving them in other ways, and levy a general tax or toll upon those using the improvements, to meet their cost, provided the free navigation of the waters, as permitted by the laws of the United States, was not impaired, and provided any system for the improvement of their navigation instituted by the General Government was not defeated. (147 U. S., 412.)

The power to tax is without limit, except the discretion of the taxing power, and it has frequently been said that it involves the power to destroy the object taxed. When the power to license and to tax exists, and the business to be licensed and taxed is obnoxious, or may be obnoxious to the governing element, having the power to license and tax, it can readily be seen how that power will be, or may be used to stop the business. (Van Brocklin vs. Tennessee, 117 U. S., 155-156.)

The Mississippi River forms the boundary between Tennessee and Arkansas, and between many other States, and a vast amount of commerce is conducted on it among the several States, and it necessarily falls under the control of Congress, as a national highway, and Congress, to a large extent, has regulated commerce upon it.

The State of Tennessee, therefore, cannot license, tax or regulate in any way the navigation upon, or the use of it. (The Passaic Bridges Cases, 3 Wallace, 792 (Appendix); The Daniel Ball, 10 Wallace, 557, 563-566; The Montello, 20 Wallace, 439; Miller vs. Mayor of New York, 109 U. S., 395; Cooley's Constitutional Limitations (6 Ed.), Chap. 16, p. 728, etc.; The Robert W. Parsons, 191 U. S., 25, etc.)

When Spain was in control of the Mississippi River, the grave objections to its exercise of the power to levy taxes or impose duties upon those who used it, were sufficiently manifest to the inhabitants of the Mississippi Valley. They undertook to secure themselves and their posterity against the

exercise of that power, in the ways and by the means already stated. They have accomplished nothing by their efforts, if any State has the power to require licenses from those who make use of the river, or to require the payment of taxes from those who use it. The use of the river is not free if any government can exclude any one from its use, or can require any one to pay any sum for its use. If Tennessee may license and tax the use of the river, so may Arkansas, and so may all the States bordering on the river. And so may any county, city or town in any riparian State, acting under the authority of the State. A vessel or boat, enrolled and licensed by the United States for the coasting trade, has the right to navigate and carry on commerce upon any of the navigable waters of the United States, and so may pass from the Gulf of Mexico up the Mississippi or any of its tributaries, or down any of those tributaries and that river to the Gulf, and engage in commerce the entire way. In doing so it may have occasion to use the ports or places of landing in a dozen or more different States, and many ports or places of landing in one single State. Can all the States, and all the counties, and all the cities, and all the towns along the river require a license and levy a tax for the right of landing, or mooring, or the right to use, and the use made of the river? If one can, why may not all? And how can there be uniformity in the licensing? And how can the taxation that may result be endured? And what do the enrollment and license of the United States amount to?

As already stated, Congress, by the Act of 3rd of March, 1803 (2 Statutes U. S. at Large, Sec. 17, p. 235), declared that all navigable rivers within the territory of the United States, south of the State of Tennessee, were, and should forever remain, public highways. It then, by the Act of 3rd of March, 1811 (2 U. S. Statutes at Large, Sec. 12, p. 666), declared that all the navigable rivers and waters in the Territories of Orleans and Louisiana should be, and forever remain, public highways. These statutes have remained the law.

Are these declarations of Congress of any force, and, if they are, can Tennessee license and tax Foppiano for selling beer and liquors on the steamboat "Chas. H. Organ," while that steamboat, duly enrolled and licensed for the coasting trade, by the United States, is engaged exclusively in the navigation of the Mississippi River, and in interstate commerce between Tennessee and Arkansas?

The case of the Passaic Bridges, reported in 3 Wallace (Appendix), p. 782, is Judge Grier's opinion in the Circuit Court. The judgment in that case was affirmed in the Supreme Court of the United States by a divided court.

In reviewing the opinion in Pennsylvania vs. The W. & B. Bridge Co. (13 Howard, 579), Judge Grier pointed out the differences between that case and the case before him, among which were the facts that the Ohio River was a boundary between Virginia and Pennsylvania, and the free navigation of the river had been secured in the compact between Virginia and Kentucky, when Virginia ceded Kentucky with a view of its becoming a State of the Union.

Referring to the bridge on the Ohio River as an obstruction to its navigation, he said: "Could Virginia license or authorize a nuisance on a public river, flowing, which rose in Pennsylvania and passed along the border of Virginia, and which by compact between the States was declared to be free and common to all the citizens of the United States? If Virginia could authorize any obstruction at all to the channel navigation, she could stop it altogether, and divert the whole commerce of the great river from the State of Pennsylvania, and compel it to seek its outlet by the railroads and other public improvements of Virginia. If she had the sovereign right over this boundary river, claimed by her, there would be no measure to her power. She would have the same right to stop its navigation altogether as to stop it ten days in a year. If the plea was admitted, Virginia could make Wheeling the head of navigation on the Ohio, and Kentucky might do the same at Louisville, having the same right over the whole river which Virginia could claim. This plea, therefore, presented not only a great question of international law, but whether rights secured to the people of the United States by compact, made before the Constitution, were held at the mercy or caprice of every or any of the States to which the river forms a boundary. The decision of the court denied this right. The plea being insufficient as a defense, of course the complainant was entitled to a decree prostrating the bridge which had been erected, *pendente lite.*" (3 Wallace, p. 192.)

In Willamet Iron Bridge Co. vs. Hatch (125 U. S., 16-17) Justice Bradley quoted what we have quoted from the

opinion of Justice Grier, and more, as a part of the opinion of the court, thus giving it the approval of the court.

In Gilman vs. Philadelphia (3 Wallace, 713) it was objected that the plaintiffs had no special interest in the navigation, and therefore they could not sue for its protection. The court referred to the opinion in the Wheeling Bridge Case (Pennsylvania vs. Wheeling & Belmont Bridge Co., 13 Howard, 518) and applied it to the case before it, holding that the suit could be maintained on the ground that wherever a public nuisance is productive of a specific injury to an individual, he may make it the foundation of an action at law, and, if the injury is irreparable, of an injunction in equity. (3 Wallace, 722-724.)

In the same case, it was said in the opinion, that the regulation of commerce requires the control of all the navigable waters, and, in substance, that they are the public property of the Nation. (3 Wallace, 724-725.)

In Mobile vs. Kimball it was said that Congress has control of the navigable rivers to insure freedom in their navigation, and that the States have the power to improve those within their territory upon the condition that they do not impair the free navigation of them. (102 U. S., 699.)

In Harman vs. Chicago (147 U. S., 396) the City of Chicago charged for licenses for tug boats navigating the Chicago River and Lake Michigan, and the owner paid the sums charged, and sued to recover them back. The tugs were above 20 tons burden, and enrolled and licensed for the coasting trade, under the acts of Congress, and were navigating Lake Michigan and its tributaries, including the Chicago River. The river had been deepened, from time to time, for navigation purposes, by dredging, under the direction and at the expense of the City of Chicago. The facts of the case were agreed on, and the question was whether or not the sum sued for had been rightfully collected.

Referring to Gibbons vs. Ogden (9 Wheaton, 213), Justice Field, in his opinion, stated that the court had held in that case that vessels enrolled and licensed, pursuant to the laws of the United States, had conferred upon them as full and complete authority to carry on the coasting trade as it was in the power of Congress to confer. (147 U. S., 405.)

He said further, that the case was similar to those of Foster vs. Davenport (22 Howard, 244), and Sinnot vs. Davenport (22 Howard, 227), and quoted a portion of the opinion of Justice Nelson in the former case. He then said: "In the present case, the neglect or refusal of the owner of the tugs to pay the license required by the ordinance, subjects him to the imposition of a fine. His only alternative is to pay the fine, or the use of his tugs in their regular business will be stopped. Of course, the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which Congress has control. No State can interfere with it, or put obstructions upon it, without coming in conflict with the supreme authority of Congress. The requirement that every steam tug, barge or tow boat, towing vessels or craft for hire, in the Chicago River, or its branches, shall have a license from the City of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign. The steam tugs are not confined to any particular locality, but may carry on the trade for which they are licensed in any of the ports and navigable rivers of the United States." (147 U. S., 406-407.)

Replying to the claim that the ordinance of Chicago was valid, because of the expenditures of the city in deepening and improving the Chicago River, Justice Field said that the decisions of Huse vs. Glover (119 U. S., 543), and Sands vs. The Manistee River Improvement Co. (123 U. S., 288) had been relied on, and the attempt made to assimilate the case before the court to those cases, and to treat the license fee required as in the nature of a toll or compensation for the expenses of deepening the river. He said: "But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen, or can arise, to the tugs in question by the alleged deepening of the river. The license is not exacted as a toll or compensation for any specific improvement of the river, of which the steam barges or tugs have the benefit, but is exacted

for the keeping, use, or letting to hire, of any steam tug or barge or tow boat, for towing vessels or craft into the Chicago River, its branches or slips connected therewith. The business of the steam barge or tow boat is to aid the movement of vessels in the river and its branches and adjacent waters—that is, to aid the commerce in which such vessels are engaged." (147 U. S., 408-409.)

The present case is not confined to the question of the right of Foppiano as a citizen of Arkansas, or his right as a citizen of Tennessee, to the free use of the Mississippi River, without any tax, duty, impost or toll therefor, but presents the broader question of his inherent right as a man, and his right as an inhabitant of what was the Louisiana Territory, and his right as an inhabitant of the territory south of the Ohio, ceded by North Carolina, and subsequently formed into the State of Tennessee, and also his right as a citizen of the United States, inhabiting a State made out of one of those Territories, considered from a national standpoint, to the free use of that river without any tax, duty, impost or toll, (1) under the law of nature and of nations; (2) under the treaties between France and Great Britain, France and Spain, Great Britain and the United States, Spain and the United States, and France and the United States, all made when the parties to the treaties were sovereigns of the country; (3) under the legislation of Congress, while the United States was the sovereign, and had possession and complete jurisdiction; (4) under the compacts between the United States and the several States, formed out of those Territories, made when those States respectively were formed, and were afterwards, on their own application, admitted into the Union of the United States, with the sanction of Congress; and (5) under the constitutions of those States, and the Constitution of the United States, conjointly, each within its sphere the supreme law, and composing the framework of the dual governments, so far as they have undertaken the preservation and protection of the right of the inhabitants, and the citizens, to the free use of the river, without any tax, duty, impost or toll, upon the suspension or displacement of the prior guarantees upon which that right rested.

That the right is an inherent right of man, or a right of an inhabitant of the Territory, or a right of a citizen of the United States in the broadest possible sense, the acts of the

sovereigns controlling and governing the country, and the legislation, and the treaties, and the legislative agreements, leave no doubt.

"The same person may be at the same time a citizen of the United States and a citizen of a State. Protection of life, liberty and property rests primarily with the States, and the fourteenth amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the State governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citzens of the States, are indeed protected by it, but those are privileges and immunities arising out of the nature, and essential character ot fhe National Government, and granted or secured by the Constitution of the United States." (Chief Justice Fuller, *in re* Kummler, 136 U. S., 448.)

Every citizen, and even every alien, has the absolute right to use a public highway, and the term includes the oceans and seas and all the public navigable rivers. (3 Kent's Commentaries, p. 432, etc.; Angell on Highways, Sections 53 and 55; Corporation of Memphis vs. Overton, 3 Yerger, 387; Gibbons vs. Ogden, 9 Wheaton, 212, etc.; Gilman vs. Philadelphia, 3 Wallace, 724-725; United States vs. Coombs, 12 Peters, 78, etc.)

In the Slaughter House Cases (16 Wallace, 79) the court said that the privileges and immunities of citizens of the United States, which under the fourteenth amendment to the Constitution no State can abridge, owe their existence to the Federal Government, its national character, its Constitution, or its laws. That definition, we submit, embraces the right Foppiano claims, to use the Mississippi River, for the purpose of carrying on the interstate commerce he is engaged in, on the steamboat "Chas. H. Organ," duly enrolled and licensed for the coasting trade, under the laws of the United States, and employed in the navigation of the Mississippi River. Whatever other support it may have, it is certainly a right of a national character, and rests on the Constitution, laws and treaties of the United States. It is of the same class of rights as that involved in Crandall vs. Nevada. And in the Slaughter House Cases (16 Wallace, 79-80), in specifying the rights

of citizens of the United States, within the protection of the Fourteenth Amendment, as privileges and immunities of such citizens, Justice Miller said: "The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State."

In Maxwell vs. Dow (176 U. S., 591) the Chief Justice referred to the Slaughter House Cases, and in enumerating the privileges or immunities of citizens of the United States, protected by the Fourteenth Amendment, mentioned the right to use the navigable waters of the United States, however they may penetrate the territory of the several States, and also all rights secured to our citizens by treaties with foreign nations.

In Memphis vs. Overton (3 Yerger, 387 (1832), Chief Justice Catron said: "Previous to the adoption of the Constitution of the United States, in this and most other respects, the States stood on the foot of independent and distinct nations. In such cases, the right of way as to highroads, and water courses, exists because a natural right, which the domain of property does not destroy. (Vat., Bk. 2, Chaps. 9 and 10.) That the Mississippi is pre-eminently an open highway, none can doubt. Yet upon principles of international law, the right to the use of the water for the purposes of passage and navigation by citizens of one State, within the jurisdiction of another, is classed among imperfect rights. This the Constitution of the United States has converted into a perfect right, by providing that the citizens of each State shall be entitled to the privileges and immunities of citizens of the several States. The water in its nature being inexhaustible, and the citizens of Tennessee having a perfect right to its use for the above purposes, may enforce the right. The same is true as to the banks of the river, so far as they are necessary for the exercise of the right—they are an easement subject to common use." (3 Yerger, 389-390.)

1 Farnham on Waters, Sec. 12.
In re Mattson, 69 Fed. Rep., 535.

In Loan Association vs. Topeka (20 Wallace, 655) Justice Miller said it must be conceded that there are rights in every free government beyond the control of the State. He said a government which recognized no such rights, which

held the lives, liberty and property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power is, after all, but a despotism. It may be a despotism of the many, but it is none the less a despotism. (20 Wallace, 662.)

He said further that the theory of our governments, State and national, is opposed to the deposit of unlimited power anywhere. There are limitations on such power which grow out of the essential nature of all free governments—implied reservations of individual rights without which the social compact could not exist, and which are respected by all governments entitled to the name.

Continuing, he said further: "Of all the powers conferred upon government, that of taxation is the most liable to abuse. Given a purpose or object, for which taxation may be lawfully used, and the extent of its exercise is, in its very nature, unlimited. It is true that express limitations on the amount of tax to be levied, or the things to be taxed, may be imposed by constitution or statute, but, in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should, in some instances, be at the disposal of the government." (20 Wallace, 663.)

In that case, a State Legislature had authorized a town to issue negotiable bonds, in aid of a manufacturing enterprise belonging to individuals. The bonds and the interest could be paid only by the levy of a tax upon the people and property of the town. In an action on the bonds by an innocent holder, for value, it was held that the power to tax to pay the bonds could not exist, as taxes could not be levied for private purposes, and therefore, that the bonds themselves were void in the hands of the holder.

The principle has frequently been applied, and instances may be found in Parkersburg vs. Brown (106 U. S., 487); Cole vs. La Grange (113 U. S., 1, 6, etc.). And see Missouri Pacific Railway vs. Nebraska (164 U. S., 403, 417.)

In St. Louis vs. The Ferry Company (11 Wallace, 430) the court said: "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the Legislature of a State should enact that the

citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, in any other manner, whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action." (Page 430.) And see:

Railroad vs. Jackson, 7 Wallace, 262.

Jeffersonville Ferry Co. vs. Kentucky, 188 U. S., 385.

If the right to the free use of the Mississippi River without any license, and without any tax, duty, impost or toll for its exercise, claimed for Foppiano in the present case, is a right of property, or is a right secured by the law of nature and of nations, or by the treaties made when or before the Louisiana Territory was acquired by the United States, or under the legislation of Congress, while Louisiana was a Territory of the United States, or by the compacts made between the United States and North Carolina and Tennessee, when Tennessee, as the Southwest Territory, was ceded to the United States, and afterwards admitted as a State, or the compacts between the United States and Georgia and Mississippi, when the Mississippi Territory was ceded to the United States, and Mississippi was admitted as a State, or by the compacts between the United States, and Virginia, and the States made out of the Northwest Territory, when those States were admitted, or the United States and the States made out of the Louisiana Territory, when that Territory was acquired, and those States admitted, then, in either case, the right is protected, as one conferred by the Constitution, Article 4, Section 2, or, else by the Fourteenth Amendment to the Constitution.

The Constitution, Article 4, Section 2, provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, and the Fourteenth Amendment declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. It declares further that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of

law, nor deny to any person within its jurisdiction the equal protection of the law.

In *Ex-parte* Virginia (100 U. S., 339) the court said that the prohibitions of the Fourteenth Amendment are addressed to the States. After quoting some of them, it said further: "They have reference to actions of the political body, denominated a State, by whatever instruments or in whatever modes the action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the la Whoever by virtue of public position, under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and, as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." And see:

Yick Wo vs. Hopkins, 110 U. S., 367.

If it is true that Foppiano was not subject to the licenses he has been required to take out, or to pay the taxes he has been compelled to pay, then, in addition to being denied the benefit of the privileges and immunities of a citizen of the United States and the right of an inhabitant of the territory in which the Mississippi River is, to its free use, he has been deprived of his property—that is, of his money, taken from him by Speed, as Clerk, without due compensation, and without due process of law, through the law of the State of Tennessee, requiring the licenses, and demanding the payment of the taxes, and the acts of Speed, the Clerk of the County Court, as the agent of the State, in carrying out the statutes as enacted.

It is immaterial, in this view, whether Foppiano's rights are natural rights, or have been vested by the Constitution and laws of the United States, or the treaties made, or the constitution and laws of Tennessee, or of Arkansas, or of any other State, or the compacts between the United States and any one or more of the States. In no event could his property or

money be taken from him without just compensation, nor could he be deprived of it without due process of law, meaning, of course, the taking of it in a lawful manner and for a lawful purpose.

In the Chicago, Burlington & Quincy Railway Co. vs. The City of Chicago (166 U. S., 226) Justice Harlan, after referring to Pumpelly vs. The Green Bay Co. (13 Wallace, 166), and Monongahela Navigation Co. vs. The United States (148 U. S., 312), and quoting from the opinion in the latter case, said: "In Scott vs. Toledo (36 Fed. Rep. 385, 395-396) the late Justice Jackson, while Circuit Judge, had occasion to consider this question. After full consideration, that able judge said, 'Whatever may have been the power of the States on this subject prior to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the State cannot now lawfully appropriate private property for the public benefit, or to public uses without compensation to the owner, and that any attempt so to do, whether done in pursuance of a constitutional provision, or legislative enactment, whether done by the Legislature itself, or under delegated authority, by one of the subordinate agencies of the State, and whether done directly, by taking the property of one person, and vesting it in another, or the public, or indirectly, through the forms of law, by appropriating the property, and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that due process of law required by said amendment. The conclusion of the court on this question is that since the adoption of the Fourteenth Amendment, compensation for private property taken for public uses constitutes an essential element in due process of law, and that without such compensation the appropriation of private property for public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution.'" (166 U. S., 238-239.)

And the conclusion of the court, as Justice Harlan announced it in that case, was: "In our opinion, a judgment of a State court, even if it be authorized by statute, whereby private property is taken for the State, or under its direction for public use, without compensation made or secured to the own-

er, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such a judgment by the highest court of the State is a denial, by that State, of a right secured to the owner by that instrument." (166 U. S., 241.) And see:

Norwood vs. Baker, 172 U. S., 269.
Scott vs. McNeal, 154 U. S., 45, etc.

Before the Fourteenth Amendment to the National Constitution, the distinction between the class of rights which was under the protection of the Constitution, as privileges and immunities of citizens in the several States, and that class belonging to every citizen without reference to his citizenship or residence, frequently determined questions of jurisdiction in this court, on writs of error under the 25th section of the Judiciary Act of 1789. Of the former class the court had jurisdiction on error, and of the latter it had not. The line of separation between the two classes was not always clear, and the courts have not undertaken to define with precision what rights belong to the one class and what to the other.

The suggestion of Justice Curtis in Conner vs. Elliott (18 Howard, 591), of not describing and defining the privileges and immunities protected as rights under the National Constitution, in a general classification, preferring to decide each case as it comes up, has generally been adopted. The rights claimed in the following cases, on writs or error to State courts, were held to be within the protection of the National Constitution: Crandall vs. State of Nevada (6 Wallace, 35, 43); Ward vs. Maryland (12 Wallace, 418, 430); Blake vs. McClung (172 U. S., 239, 248, etc.); C., B. & Q. R. R. vs. Chicago (166 U. S., 226); Worcester vs. The State of Georgia (6 Peters, 515, 561-562); The New York Indians (5 Wallace, 761); Hauenstein vs. Lynham (100 U. S., 483); Van Brocklin vs. Tennessee (117 U. S., 151); The Kansas Indians (5 Wallace, 737); Stearns vs. Minnesota (179 U. S., 223); McCulloch vs. Maryland (4 Wheaton, 316); State Bank vs. Knoop (16 Howard, 369); Gibbons vs. Ogden (9 Wheaton, 1); Weston vs. City of Charleston (2 Peters, 449); The Banks vs. The Mayor (7 Wallace, 16); Hall vs. DeCuir (95 U. S., 485); Bank of Commerce vs. New York (2 Black, 620); Neil vs. Ohio (3 Howard, 720).

And those claimed in the following cases were held on such writs of error not to be within such protection: Conner vs. Elliott (18 Howard, 591); Barron vs. Baltimore (7 Peters, 243); McCraedy vs. Virginia (94 U. S., 391, 395); Walker vs. Sauvinet (92 U. S., 90); Cole vs. Cunningham (133 U. S., 107, 113); Ward vs. Race Horse (163 U. S., 504); French vs. Barber Asphalt Co. (181 U. S., 324); Menard vs. Aspasia (5 Peters, 505); New Orleans vs. DeArmas (9 Peters, 223); New Orleans vs. United States (10 Peters, 662); Permoli vs. Municipality No. 1 (3 Howard, 589); Strader vs. Graham (10 Howard, 82); Scott vs. Sanford (19 Howard, 452); Maxwell vs. Dow (176 U. S., 581); Slaughter House Cases (16 Wallace, 36).

The cases of New Orleans vs. The United States (10 Peters, 662), Permoli vs. Municipality No. 1 (3 Howard, 589), Strader vs. Graham (10 Howard, 82), Scott vs. Sanford (19 Howard, 452), as well as New Orleans vs. De Armas (9 Peters, 233), Menard vs. Aspasia (5 Peters(505), and perhaps other similar cases, presented substantially the same class of rights, and went off on the want of jurisdiction in the Supreme Court under the 25th section of the Judiciary Act. That statute limited the jurisdiction of the court upon a writ of error, to a court of a State, to cases arising under the Constitution or laws of the United States, or treaties made under its authority. But even under that statute, it was not required that the right should have been created by the Constitution, or the treaty, or the law of the United States. It was enough that such right was protected by such Constitution, law or treaty. Thus, Chief Justice Marshall said, in New Orleans vs. De Armas, in replying to the argument of counsel on the motion to dismiss the writ of error, that the Judiciary Act limited the jurisdiction of the court to cases where the right was created by the Constitution, a treaty, or a law of the United States: "We think differently. This construction would defeat the obvious purpose of the Constitution, as well as of the act of Congress. The language of both instruments extends the jurisdiction of this court to rights protected by the Constitution, treaties or laws of the United States, from whatever source those rights may spring." (9 Peters, 234.)

In this case, under the statute of Tennessee, Shannon's Code, Sec. 5206 (3450), the parties were required only to set

out the facts on which the controversy depended, and that was done fully.

The facts that Foppiano made all the sales of the liquor and beer ever made by him, on board the steamboat "Chas. H. Organ," while he was engaged in business as a barkeeper on that boat, and while the boat, duly enrolled and licensed by the United States for the coasting trade, was engaged in the navigation of the Mississippi River, and in interstate commerce between the State of Tennessee and the State of Arkansas, distinctly appear in the agreed case.

The parties in agreed cases are entitled to all benefits of the proceedings for due correction of errors. (Shannon's Code, Sec. 5210 (3454.)

Under the 25th section of the Judiciary Act of 1789, the Federal questions are properly presented in this case. (Crowell vs. Randall, 10 Peters, 368; Armstrong vs. The Treasurer of Athens County, 16 Peters, 281; Furman vs. Nichol, 8 Wallace, 44.)

The Act of Congress of 5th of February, 1867 (U. S. Revised Statutes, Sec. 709), amended the 25th section, as the court held in Murdock vs. City of Memphis (20 Wallace, 591), so that this court is not so closely restricted to the record, as under the 25th section, and may look to the properly certified opinion of the State court deciding the case, and if it appears that one of the questions mentioned in the statute must have been raised and presented to the State court, and decided by it against the right claimed or asserted by the plaintiff in error, under the Constitution, treaties, laws or authority of the United States, or that such decision was necessary to the judgment or decree rendered in the case, then it has jurisdiction on a writ of error. In applying the rule established, the court has held that, though no Federal right, title or immunity was specially set up or claimed in the complaint, the jurisdiction exists, if it appears in a motion for a new trial and in the assignment of errors in the State Supreme Court, or in the opinion of the State court that the question was considered and ruled against the plaintiff in error. (Loeb vs. Columbia Township, 179 U. S., 481, etc.; San Jose Land and Water Co. vs. San Jose Ranch Co., 189 U. S., 177; German Savings and Loan Society vs. Dormitger, 192 U. S., 125.)

II.

THE WEST MEMPHIS PACKET COMPANY, A CORPORATION OF THE STATE OF ARKANSAS, OWNED AND LAWFULLY EMPLOYED THE STEAMBOAT "CHAS. H. ORGAN," AS A FERRY BOAT, AND IN INTERSTATE COMMERCE BETWEEN THE STATE OF ARKANSAS AND THE STATE OF TENNESSEE, IN NAVIGATING THE MISSISSIPPI RIVER, AND THE STEAMBOAT, WHEN ON THE TENNESSEE SIDE OF THE MAIN CHANNEL OF THE RIVER, OR LANDED AT MEMPHIS, WAS A PART OF THE TERRITORY OF THE STATE OF ARKANSAS, AND FOPPIANO SELLING BEER AND LIQUORS UPON THE STEAMBOAT, WAS LOCALLY OUTSIDE THE JURISDICTION OF THE STATE OF TENNESSEE, AND HIS BUSINESS COULD NOT BE MADE A PRIVILEGE, AND HE WAS NOT SUBJECT TO BE LICENSED OR TAXED BY THE STATE FOR CARRYING ON THE BUSINESS.

The West Memphis Packe ompany being a corporation created under the laws of Arkansas, existed only in the State of Arkansas as a corporation, and not having complied with the laws of the State of Tennessee regulating foreign corporations, and the business carried on by them within the State, it could be taken notice of or recognized in the State of Tennessee, if at all, only as a matter of comity.

Bank of Augusta vs. Earle, 13 Peters, 519;
Talmadge vs. North American Coal & Transportation Co., 3 Head, 337;
State vs. Phoenix Ins. Co., 92 Tenn., 420;
St. Louis vs. Ferry Co., 11 Wallace, 429-432;
Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 209, etc.

It had as a corporation of the State of Arkansas, by its charter, power to own the steamboat "Chas. H. Organ," and to use it in the navigation of the Mississippi River and its trib-

utaries. The steamboat was duly enrolled and licensed under the acts of Congress regulating the coasting trade, and thereby authorized to navigate the navigable waters of the United States, including the Mississippi River.

The West Memphis Packet Company also had licenses from the County Court of Crittenden County, Arkansas, the tribunal authorized by the laws of the State of Arkansas to grant and issue such licenses to maintain and keep up a ferry across the Mississippi River between Tennessee and Arkansas, and had been for many years carrying on such ferry, and engaged in that way in interstate commerce between the State of Tennessee and the State of Arkansas. That the carrying on of the ferry, and the commerce was lawful, cannot be doubted.

Kirby's Digest of the Statutes of Arkansas (1904), Secs. 3556, 3559-3562 and 3565-3566;
Shannon's Code of Tennessee (1894), Secs. 1697-1698;
Memphis vs. Overton, 3 Yerger, 387;
Conway vs. Taylor, 1 Black, 603;
Gould on Waters, Sec. 133.
Chief Justice Marshall in Gibbons vs. Ogden, 9 Wheaton, 189, etc.;
Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196;
Organ vs. M. & L. R. R. Co., 51 Ark., 271-272.
1 Farnham on Waters, Sec. 12a.

The steamboat "Chas. H. Organ," licensed and enrolled under the laws of the United States, for national purposes, was a creature of Congress, and subject immediately to the jurisdiction of the United States.

White's Bank vs. Smith, 7 Wallace, 646, 655, etc.;
The Lottawana, 21 Wallace, 558, 577, etc.;
Sherlock vs. Alling, 93 U. S., 96, 103, etc.;
Providence & New York S. S. Co. vs. Hill Mfg. Co., 109 U. S., 578.

Under international law, vessels and boats navigating the oceans, seas and other public navigable waters belong to the sovereignty of which their owners are citizens or subjects, and they form a part of the territory of such sovereignty. Wherever such vessels or boats may be while engaged in navigation or commerce on public navigable waters, in the view of the

law, they constitute a part of the territory of the sovereignty, to which they belong.

Wharton's Conflict of Laws, Sec. 356;
Henry's Admiralty Jurisdiction and Procedure, Sec 37, p. 107;
Wilson vs. McNamee, 102 U. S., 574;
The Lamington, 87 Fed. Rep., 754;
1 Kent's Commentaries, p. 26;
St. Clair vs. U. S., 154 U. S., 150-152;
The Scotia, 14 Wallace, 184-185.

The same principle has been applied as between the States of the American Union. A vessel or boat at sea, or on a public navigable water, enrolled and licensed for the coasting trade, by the United States, except, perhaps, for local police and health regulations, and the administration of the local criminal laws, is conclusively presumed to belong to the State of which its owner is a citizen or resident, and to be a part of the territory of such State, and subject to the operation of its laws, though it may be, when the facts giving rise to the controversy occur, within an arm of the sea, or in a part of a navigable water, within the territorial limits of another State.

Crapo vs. Kelly, 16 Wallace, 610;
International Nav. Co. vs. Lindstrom, 123 Fed. Rep., 475;
In re Clyde S. S. Co., 134 Fed. Rep., 95, 99, etc.;
Lindstrom vs. International Nav. Co., 117 Fed. Rep., 171;
McDonald vs. Mallory, 77 New York, 546.

In law, therefore, the Chas. H. Organ navigating the Mississippi River, or engaged in ferrying, or commerce between Arkansas and Tennessee thereon, was always in Arkansas, and under its jurisdiction, while Foppiano was selling beer and liquors on board it, even though, as a matter of fact, it may have been moored at the landing at Memphis, or anywhere else in the river, on the Tennessee side of the middle of the main channel, temporarily, for the purposes of such navigation or commerce.

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 205, etc.

In Hays vs. The Pacific Mail Steamship Co. (17 Howard, 596), the steamships were regularly plying between Panama and San Francisco and ports in Oregon, but the steam-

ship company owning them resided in New York and the steamships were registered there. They stopped in the San Francisco harbor to land and receive passengers and cargo. They also stopped at Benicia for repairs and supplies in the course of their voyages. California undertook to tax them as property. The court held that they were not taxable there.

Justice Nelson said: "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation. They were not property abiding within its limits, so as to become incorporated with the other personal property of the State. They were there, but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

17 Howard, 599-600.

In St. Louis vs. The Ferry Company (11 Wallace, 423) the Ferry Company was incorporated under the laws of the State of Illinois, but had its principal office in St. Louis, Missouri, and the boats used were all enrolled and licensed in the United States Custom House there. Its directors and officers resided there, and the ordinary business meetings of the directors were held there, and the seal of the corporation kept there. The minor officers of the company—such as engineers and pilots, resided in Illinois, where the company's real estate was situated, and where it had a warehouse and other property. The Ferry Company used its boats to transport passengers and cargo across the Mississippi River, to and from St. Louis, Mo., and East St. Louis, Ill. St. Louis under the authority of the State of Missouri, levied a tax on the value of all the ferry boats, and the question was whether or not the tax was lawful.

The court held that Illinois was the home port of the boats, and that they were beyond the jurisdiction of the City of St. Louis, which had assessed the tax, and that the tax could not be collected.

In Morgan vs. Parham (16 Wallace, 471) the vessel was regularly enrolled and licensed, or registered, at New York, and was one of a daily line of steamers between New York and New Orleans. It was enrolled by its master as a "coaster," at Mobile, Alabama, under a statute of that State, and its license

as a coaster was renewed there from year to year. In its voyages from New York to New Orleans, it stopped temporarily at Mobile, engaged in lawful commerce.

The State of Alabama undertook to tax the vessel as personal property, subject to taxation in the State.

This court held that the *situs* of the vessel was at the home port in New York, where its owner resided, and that the State of Alabama could not lawfully tax the vessel.

The court said in its opinion that Alabama had no jurisdiction over the vessel for the purposes of taxation, "for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the States, with its *situs* at its home port of New York, where it belonged, and where its owner was liable to be taxed for its value."

16 Wallace, 476-477. And see:
Transportation Co. vs. Wheeling, 99 U. S., 273, 282, etc.

Justice Gray, in delivering the opinion in Pullman Car Co. vs Pennsylvania (141 U. S., 23), said: "Ships or vessels engaged in interstate or foreign commerce upon the high seas or other waters, which are a common highway, and having their home port at which they are registered under the laws of the United States, at the domicile of their owners in one State, are not subject to taxation in another State, at whose ports they incidentally and temporarily touch, for the purpose of delivering or receiving passengers or freight. But that is because they are not in any proper sense abiding within its limits, and have no continual presence or actual *situs* within its jurisdiction, and, therefore, can be taxed only at their legal *situs*—their home port, and the domicile of their owners."

It is true that Memphis appears to be the home port of the steamboat "Chas. H. Organ"—that is, the steamboat is duly enrolled and licensed there, but this is because the act of Congress requires the enrollment and license or registry to be at the port nearest to that at which her owner or husband or acting and managing owner usually resides. It also requires the name of the boat or vessel and the port to which she belongs to be painted on her stern.

Revised Statutes of the United States, Secs. 4141, 4312 and 4334.

But the fact that the "Chas. H. Organ" is enrolled and licensed at the custom house at Memphis does not determine that Memphis is its home port. The license and enrollment are simply because Memphis is the nearest port of the United States to West Memphis, Arkansas, where, it is agreed, the West Memphis Packet Company, owning the "Chas. H. Organ," has its *situs* or domicile and residence. While the license and enrollment are *prima facie* evidence of the home port of a vessel or boat, it may always be shown that such is not the fact, and that its home port in reality is elsewhere. In law, such home port is always the residence of the true owner.

Hays vs. The Pacific Mail S. S. Co., 17 Howard, 598-599;
Morgan vs. Parham, 16 Wallace, 474-476.

In St. Louis vs. The Ferry Co. (11 Wallace) Justice Swayne said: "The boats were enrolled at the City of St. Louis, but that throws no light upon the subject of our inquiry. The Act of 1789, Sec. 2 (1 U. S. Statutes at Large, 55), and the Act of 1792, Sec. 3 (1 U. S. Statutes at Large, 287), requires every vessel to be registered in the district to which she belongs, and the fourth section of the former act, and the third section of the latter, declares that her home port shall be that at or near which her owner resides. The solution of the question, where her home port is, when it arises, depends upon the locality of her owner's residence, and not upon the place of her enrollment." (Page 431.)

The exact point, as applicable to this case, was decided in International Navigation Co. vs. Lindstrom (Circuit Court of Appeals, Second Circuit), where it was held that a steamship, owned by a corporation of New Jersey, was a vessel of that State, and subject to its laws, notwithstanding the registry of the steamship in New York, reversing the decision of Judge Thomas, in 117 Fed. Rep., 170.

123 Fed. Rep., 475. And see:
The Mary Chilton, 4 Fed. Rep., 847;
The E. A. Barnard, 2 Fed. Rep., 712;
The Jenny B. Gilkey, 19 Fed. Rep., 127;
The Sarah Starr, 1 Sprague Rep., 453;
The Martha Washington, 1 Clifford's Rep., 466;
The New Brunswick, 125 Fed. Rep., 568.

Chief Justice Marshall said, in McCullough vs. Maryland (4 Wheaton, 429): "All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."

The principle was applied in the case of the State Tax on Foreign Held Bonds (15 Wallace, 300).

It was held there that the power of taxation of a State is limited to persons, property and business within its jurisdiction, and that all taxation must relate to one of those subjects. In that case the State of Pennsylvania laid a tax on the interest paid by a railroad company on its bonds. The bonds were held by non-residents of the State and were beyond the jurisdiction of the State.

The court held that the tax was on the property of the creditor holding the bonds, and not on the property of the railroad company, the debtor. The court said that no adjudication should be necessary to establish so obvious a proposition, as that property lying beyond the jurisdiction of a State was not a subject upon which the taxing power can be legitimately exercised, and that "the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

15 Wallace, p. 319.

The court added: "It is only one of many cases where under the name of taxation an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is in fact a forced contribution, levied upon property,. held in other States, where it is subjected, or may be subjected to taxation upon an estimate of its full value."

15 Wallace, 321.

In Railroad vs. Jackson (7 Wallace, 262) a railroad company had been incorporated by each Maryland and Pennsylvania. The company issued negotiable bonds, bearing interest, secured by a mortgage on the whole road, lying partially in each Pennsylvania and Maryland.

The court held that Pennsylvania had no power to tax the interest on the bonds, saying: "If the State of Pennsylvania

is at liberty to tax these bonds, then to the extent of the Maryland portion of the road, it is taxing property and interest beyond its jurisdiction. This portion avails her tax roll as effectually as if it was situated within her own limits."

7 Wallace, 267.

In The Erie Railroad vs. Pennsylvania (153 U. S., 664) the court said: "No principle is better settled than that the power of a State, even its power of taxation, with respect to property, is limited to such as is within its jurisdiction."

In Kentucky it is settled that the low water mark on the Indiana side of the Ohio River is the boundary of Kentucky, and that the river is entirely within its limits. (Henderson Bridge Co. vs. Henderson City, 173 U. S., 609-613.) Indiana granted a franchise to a Kentucky corporation to maintain a ferry across the Ohio River from the Indiana shore to the Kentucky shore. Kentucky undertook to assess the franchise of operating the ferry for taxation. In doing so it capitalized the net earnings of the ferry company, exercising the franchise, at six per cent. It ascertained the value of the property that would be thereby produced, and from that sum deducted the value of the tangible property of the ferry company in Kentucky and Indiana, and thus left a sum which it found and declared to be the value of the ferry company's franchise, and on this sum levied the tax.

This court held that the taxation of the Indiana franchise by Kentucky amounted to a deprivation of property without due process of law, in violation of the provisions of the Fourteenth Amendment of the Constitution.

Justice Harlan, delivering the opinion, said: "There is, in our judgment, no escape from the conclusion that Kentucky thus asserts its authority to tax a property right—an incorporeal hereditament—which has its *situs* in Indiana. While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the Legislature—that power is limited by the principle inhering in the very nature of constitutional government, viz., that the taxation imposed, must have relation to a subject within the jurisdiction of the taxing government."

Jeffersonville Ferry Co. vs. Kentucky, 188 U. S., 395-396.

A steamboat was used exclusively in transferring freight and passengers across the Mississippi River at Memphis to and from the tracks of the Little Rock & Memphis Railroad Company, an Arkansas corporation, in Arkansas, and its terminal tracks in Tennessee. The State, the County of Shelby and the City of Memphis assessed the steamboat as the property of the railroad company for taxation *ad valorem*. The Supreme Court of Tennessee held that the assessment was without authority, as the steamboat was the property of the railroad company, used in its business as a common carrier, and assessable only as a part of the railroad, and by the Railroad Assessors, and that their failure to assess the steamboat as railroad property did not confer the right or power on the Assessor to make the assessment.

Railroad vs. Williams, 101 Tennessee, 146.

This last cited case should be considered in connection with St. Clair County vs. Interstate Car Transfer Co. (109 Fed. Rep., 741), affirmed by this court in St. Clair County vs. Interstate Land & Car Transfer Co. (192 U. S., 454).

In that case the court held that a State has no power to exact a license fee for the operation of a ferry across a navigable river between a point in such State and a point in another State, where the corporation owning and operating such ferry is a citizen and resident of the latter State, and the vessels employed have their *situs* in such State for purposes of taxation, and the only property of the company within the State seeking to impose the license fee consists of its landing place and facilities. As applied to such a case the court held that the license fee is a direct burden upon interstate commerce. The court left undecided whether there is any conflict between the decisions in Fanning vs. Gregoire (16 Howard, 524), and Conway vs. Taylor (1 Black, 603), on the one side, and The Gloucester Ferry Co. vs. Pennsylvania (114 U. S., 196), and The Covington, Etc., Bridge Co. vs. Kentucky (154 U. S., 204), on the other, as such a decision was not required by the case. And see Organ vs. M. & L. R. R. Co., 51 Ark., 271-272.

In Johnson vs. The Southern Pacific Co. (196 U. S., 1) it was held that a dining car regularly engaged in interstate traffic did not cease to be so when waiting for the train to make the next trip.

In that case it was argued by the counsel on one side that there is a distinction between a car or instrument used in moving interstate commerce, and the commerce itself. It was said a car used in interstate traffic is one thing, and the point of time when the character of interstate commerce attaches to a commodity, is another. On the other side it was replied that the dining car was not an interstate car, while it had been in such use, and might be thus used again. When it was not so used, it maintained its local character and did not come under the act. (27 U. S. Statutes at Large, Chap. 196.) The mere intention to make a commodity a subject of interstate commerce, it was said, does not of itself impress the article with that character.

In the opinion, Chief Justice Fuller said: "Another ground on which the decision of the Circuit Court of Appeals was rested remains to be noticed. That court held by a majority, that as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the east bound train was so late that it was found that the car could not reach Ogden in time to return on the next west bound train, according to intention, and it was, therefore, dropped off at Promontory, to be picked up by that train as it came along that evening. The presumption is that it was stocked for the return, and as it was not a new car, or a car just from the repair shop on its way to its field of labor, it was not 'an empty'—as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employes is practically the same, and we agree with the observation of District Judge Shiras, in Voelker vs. Railway Co. (116 Fed. Rep., 867) that, 'it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars were empty.' Counsel urges that the character of the dining car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement, or being put into a train for such use, and Coe vs. Errol (116 U. S., 517) is cited as supporting that contention.

"In Coe vs. Errol, it was held that certain logs cut in New Hampshire and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former State before transportation had begun. The distinction between merchandise, which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different States, renders this and like cases inapplicable. Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law."

196 U. S., 21-22.

No instrument employed in interstate commerce can be taxed by a State. This is clearly shown in Covington & Cincinnati Bridge Co. vs. Kentucky (154 U. S., 212-213).

The principle is the same as that uniformly applied, where it has been attempted by a State to tax an agency or instrumentality of the National Government, or a subject created by Congress in legislating under the authority of the Constitution. McCullough vs. Maryland (4 Wheaton, 316, 425, etc.), and Osborn vs. United States Bank (738, 825, etc.), proceed on this idea and sufficiently support our position.

The principle has been carried to the point of holding that a State cannot tax a trader licensed by the United States.

Foster vs. County Commissioners, 7 Minnesota, 140.

Violations of the criminal laws on steamboats on the Mississippi River within the boundaries of a State may be punished just as if commited on land in the State.

United States vs. Bevans, 3 Wheaton, 336.
McFarland vs. McKnight, 6 Ben Monroe (Ky.), 505.
In re Mattson, 69 Fed. Rep., 535.
McFall vs. Commonwealth, 2 Metcalf (Ky.), 394.
1 Farnham on Waters. Secs. 11, 19 and 20.

The present case does not involve any violation of any criminal law of Tennessee, nor even the violation of any police regulation. Foppiano took out the licenses and paid the taxes, penalties and costs demanded, and the simple question

is whether they were rightfully demanded and collected, or have been extorted in violation of right and of law. Cases showing that a State, in the absence of legislation by Congress, may prohibit the running of trains of cars on Sunday (Hennington vs. Georgia, 163 U. S., 299), or may require licenses from persons acting as engineers upon railroad trains within the State (Missouri, etc., R. R. vs. Haber, 169 U. S., 633; Smith vs. Alabama, 124 U. S., 465), or may compel the heating of passenger cars on railroads operated within the State (New York, etc., R. R. Co. vs. New York, 165 U. S., 628; L. & N. R. R. Co. vs. Mississippi, 133 U. S., 589) have no application to the questions presented. The cases showing sales of liquors from palace cars—parts of trains of cars on railroads—in a State, in violation of State laws, to be illegal, likewise have no application.

All those cases arose on land, and within the body of the State. None of them grew out of anything done on the Mississippi River, or any public navigable water of the United States, forming the boundary between States, and regulated by Congress. Such waters, for the purposes of navigation and commerce, and the rules to be applied to the boats and vessels engaged, and for the government of the persons employed upon them, in such navigation and commerce, are outside the jurisdiction of any State, and within the jurisdiction of the United States, even when the voyages are between ports of the same State.

Lord vs. Steamship Co., 102 U. S., 541.
The Robert W. Parsons, 191 U. S., 17.
Mobile vs. Kimball, 102 U. S., 697.

In Railroad Co. vs. Maryland (21 Wallace, 456,) Justice Bradley said: "Commerce on land between the different States is so strikingly dissimilar in many respects from commerce on water that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt, commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recog-

nized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water, being instruments of intercommunication with other nations, the regulation of them is assumed by the National Legislature, so that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible."

21 Wallace, 470.

In discussing the extent of the power of Congress to regulate commerce with reference to highways, including public navigable waters and artificial highways, Justice Brewer, in delivering the opinion in Monongahela Navigation Co. vs. United States (148 U. S., 312), quoted in part and approved what we have just quoted from Justice Bradley's opinion. And see Justice Gray's opinion in Pullman Car Co. vs. Pennsylvania (141 U. S., 23-25) and Justice Bradley's dissenting opinion (pp. 32-33).

In its opinion, the Supreme Court of Tennessee said: "We do not deem it necessary to place this case on narrow or technical grounds, as we think the judgment of the trial court can be rested on the broader ground that the imposition of the tax or license fee was distinctly within the police power of the State."

Record, p. 61.

This is a singular position. The police power and the power of taxation are certainly not the same, but are entirely distinct and different, and the court could not have meant to assert the contrary.

The Constitution of Tennessee provides: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title." (Article 2, Sec. 17.)

The Supreme Court has decided many times that an act of the General Assembly embracing more than one subject is void *in toto*.

State vs. McCann, 4 Lea, 1.

The statutes of 1903, requiring the license and the tax involved here (and the acts of 1899 and 1901 were just like it) is entitled: "An Act to provide revenue for the State of Tennessee and the counties and municipalities thereof."

Acts of Tennessee of 1903, Chp. 257, p. 599.

After prescribing the tax upon property for State purposes and providing for the levy by county courts of county taxes, and providing for the taxation of merchants, the statute declares:

"That each vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege, and the taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerks, as provided by law for the collection of revenue."

Acts of Tennessee of 1903, p. 600, Sec. 4.

Down in the section is the provision immediately involved in this case, as follows: "Persons selling beer or any quantity of liquors on steamboats, flatboats, or any other vessel or water craft, or from railroad cars, shall pay a tax each in lieu of all other taxes, to be paid in any county they may elect, per annum, two hundred dollars."

Acts of Tennessee of 1903, p. 652.

Section 16 of the same act declares: "That it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than ten dollars nor more than fifty dollars for each day such privilege is exercised without license, but this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce."

Acts of Tennessee of 1903, pp. 629-630.

If the court was right in putting the statute under the class embracing the police power of the State, then the statute is simply void, as its title expresses no such subject, but does clearly embrace in its title the subject of "providing revenue for the State of Tennessee and the counties and municipalities thereof." No other subject could be contained in the act without rendering the entire act void. And the body of the act, when read, shows beyond question that no subject, except revenue for the State, counties and municipalities, was embraced.

In the Mayor and Aldermen of Knoxville vs. Lewis, 12 Lea, 180, the title of the act was: "An act to provide more just and equitable laws for the assessment and collection of revenue for State and county purposes, and to repeal all laws

now in force whereby revenue is collected from the assessment of real estate, personal property, privileges and polls," and the act provided in its body for the collection of municipal taxes. It was held that the act was void under the Constitution, Article 2, Sec. 17.

In Brennan vs. Titusville, 153 U. S., 289, this court decided two propositions applicable here: (1) That a law of a State requiring an agent of a foreign manufacturer to take out a license to sell goods and pay a tax therefor is an exercise of the taxing power and not of the police power, and (2) That this court is not bound by the decision of the highest court of the State in which the license is required and the tax levied that the power exercised in passing the law is the police power of the State, and not its power of taxation, but will decide that question for itself.

153 United States, 301, etc.

Foppiano and the West Memphis Packet Company, for the purposes of this suit, are one and the same. Foppiano was merely one of its instruments or employes, by and through whom the West Memphis Packet Company navigated the Mississippi River with the steamboat "Chas. H. Organ" and carried on ferriage and commerce between the State of Arkansas and the State of Tennessee. Foppiano in this controversy represents the West Memphis Packet Company and stands in its place and stead. It is his landlord, and he looks to it for protection in selling beer and liquors at the bar. The licenses and taxes the State of Tennessee required and collected from Foppiano were, in substance, collected from the West Memphis Packet Company, the owner of the steamboat "Chas. H. Organ," employing it, while Foppiano was selling beer and liquors at the bar, in the navigation of the Mississippi River, and in ferriage and commerce between the State of Tennessee and the State of Arkansas. The licenses and taxes were really a burden and charge on the business of that company. Foppiano was the tenant of the West Memphis Packet Company on its boat, and paid it rent for the bar. The amount of the rent, or the value of the use of the bar, was necessarily diminished or reduced by the sum taken to pay for the licenses and the taxes. If Foppiano was obliged to pay these sums, he must necessarily reduce his rent to be paid by the amount of them, or get them back from the West

Memphis Packet Company, the owner of the steamboat, and of the bar, and his landlord. The charge could not reasonably be expected to fall on him.

The cases decided, we submit, fully sustain the position that the licenses and taxes were illegal and void, not only as to the West Memphis Packet Company, but also as to Foppiano.

A tax on the occupation of the importer is the same as a tax on the imports.

Brown vs. Maryland, 12 Wheaton, 444.
Norfolk & Western Ry. Co. vs. Sims, 191 U. S., 441.

A tax on the income of United States securities is a tax on the securities themselves.

Weston vs. City of Charleston, 2 Peters, 449.

An income from an official position cannot be taxed, if the office itself cannot be taxed.

Dobbins vs. Commissioners, 16 Peters, 435.

A duty on a bill of lading is the same thing as a duty on the article shipped.

Almy vs. California, 24 Howard, 169.

A tax on the income from interstate commerce is a tax upon the commerce itself.

Philadelphia Steamship Co. vs. Pennsylvania, 122 U. S., 326.
Leloup vs. Mobile, 127 U. S., 640.

A tax on the amount of the sales of goods made by an auctioneer is a tax upon the goods sold.

Cook vs. Pennsylvania, 97 U. S., 566.

A tax on the rents or income of real estate is a direct tax on the land under the Constitution, and a tax on the income derived from the interest of negotiable bonds, issued by a municipal corporation, is a tax on the power of the State and its instrumentalities to borrow money.

Pollock vs. Farmers' Loan & Trust Co., 157 U. S., 429.

Commerce is carried on through persons, and a tax having the effect of diminishing personal intercourse is a tax on commerce.

Lin Sing vs. Washburn, 20 California, 534.

A tax on the business of transporting goods from State to State is a tax upon the commerce between the States.

Erie Ry. Co. vs. State, 2 Vroom, N. J., 531.

A charge for a license to sell beer and liquors is an indirect tax on the beer and liquors sold, and a tax upon the beer and liquors is a tax on the persons who drink them.

Ch. J. Taney in License Cases, 5 Howard, 575-576.

In Crandall vs. The State of Nevada, 6 Wallace, 35, a tax on railroad companies and stage companies for every passenger carried out of the State by them, was held to be a tax on the passengers for the privilege of passing through the State by the ordinary modes of travel, and not a simple tax on the business of the companies.

A tax upon the agent selling goods is a tax on the goods sold.

Welton vs. Missouri, 91 U. S., 275.
Robbins vs. Shelby Taxing Dist., 120 U. S., 489.
Kehrer vs. Stewart, 197 U. S., 65.

A tax on freight transported from State to State is a tax on the commerce.

State Freight Tax, 15 Wallace, 232.

A tax upon receiving and landing passengers or freight from a boat or vessel is a tax on the commerce.

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196.

A tax on a passenger carried on a ship or boat is a tax on the business carried on by the ship or boat.

People vs. Compagnie Gen. Transatlantique, 107 U. S., 59.
Smith vs. Turner (Passenger Cases), 7 Howard, 283.

A tax on the gross receipts of railroads for the carriage of freight and passengers into, out of or through a State is a tax on interstate commerce.

Fargo vs. Michigan, 121 U. S., 230.

The United States, after constructing, or constructing in part, the Cumberland Road as a line of communication between the seat of government and the great valley of the Mississippi, through Maryland, Pennsylvania, Virginia and Ohio, by certain acts of Congress (4 U. S. Statutes at Large,

483, 553, 655, 680 and 772), upon prescribed terms and conditions, turned over that road within those States, respectively, to each State, and each State, by acts of its Legislature, accepted the road within its borders, and assented to the terms and conditions prescribed by Congress. One of the conditions was, in substance, that no toll should be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States. Pennsylvania enacted a statute imposing a toll upon carriages carrying the mail of the United States over that part of the road in Pennsylvania, and the court held the statute void, as in conflict with the compact between the United States and the State. Searight vs. Stokes, 3 Howard, 151.

Ohio passed a statute imposing a toll upon passengers in mail stage coaches over the Cumberland Road in that State of three cents at each toll gate, and authorized the Board of Public Works to raise and modify the rates of toll to be paid by persons using the road, and the board increased the toll on each passenger in a mail stage coach to ten cents. In Neil vs. Ohio, 3 Howard, 720, it was held that what Ohio had done was in effect to impose upon the United States a part of the burden of supporting the Cumberland Road, and was contrary to the compact between Ohio and the United States, under which the State took the road, and therefore was illegal and void.

Maryland enacted a statute that the owner of every passenger or mail coach or stage passing the toll gates on the Cumberland Road pay four cents for every passenger carried ten miles, and in that proportion for greater and less distances, which should be received in lieu of the tolls then established on all coaches or stages with four horses, passing over the road. In Achison vs. Huddleston, 12 Howard, 293, it was held that the toll imposed for the passenger was the imposition of a tax on the United States through the contractors carrying the mail, and a violation of the compact between the United States and Maryland, and void.

Taking another view, Foppiano's rights in this suit are independent of and in addition to those of the West Memphis Packet Company. While he is entitled, as its tenant on the

steamboat "Chas. H. Organ," renting the bar from it and paying rent therefor, to claim the benefit of the corporate existence and powers of the West Memphis Packet Company, as a corporation of the State of Arkansas, having the right and authority to navigate and carry on commerce upon the Mississippi River and its tributaries, and of the fact that while he was selling the beer and liquors at the bar on the steamboat, it was engaged in commerce on the Mississippi River, in the exercise of those powers, and of the enrollment and license of the steamboat by the United States for the coasting trade, and of the licenses to the West Memphis Packet Company from the authorities of Arkansas to keep up and maintain a ferry across the Mississippi River, from the State of Arkansas to the State of Tennessee, and thus was actually employed in interstate commerce, he has also his distinct, individual and personal right to the free use of the river for any and all proper purposes. He is an inhabitant of the Mississippi Valley, and whether a citizen of Arkansas or Tennessee, is a citizen of the United States, and as such has the same right freely to use the river lawfully in his own way that any other individual or combination of individuals can have.

He need not own a steamboat, or any enrolled or licensed water craft, and the extent of his business, and the character of his business, so it is not unlawful, and the manner of conducting it, are wholly immaterial in determining his rights. If he chose to use a skiff, and row it back and forth across the river, personally, and transport freight and passengers, and charge hire for doing so, he would be as completely in the rightful use of the river, and in the exercise of the right of interstate commerce between Arkansas and Tennessee, as he could be when running a boat, duly enrolled and licensed, and in every way authorized to use the river and carry on commerce between those States.

In like manner, he had the personal, absolute right to use the river and carry on commerce between Arkansas and Tennessee on the steamboat "Chas. H. Organ," navigating the river between those States, by keeping the bar on the steamboat, and selling the beer and liquors from the bar, while the steamboat was in the river, and engaged in navigation and commerce, if he could make a satisfactory arrangement with

the West Memphis Packet Company, the owner of the steamboat.

To use a part of the quotation already made, from Justice Breese, in his opinion in Illinois River Packet Co. vs. Peoria Bridge Association, 38 Ill., 467, the Mississippi River "is a common highway, free to the Indian in his bark canoe, and every other vessel floating upon the water, whether propelled by animal power, by the wind, or by the agency of steam. It is a common highway, free, and so forever to remain to all citizens of the United States, no matter where residing, not one of whom, in the free use of it, can be compelled to pay any tax, impost or duty whatever therefor."

38 Illinois, 478.
Chief Justice Marshall in Gibbons vs. Ogden, 9 Wheaton, 190, etc.
Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 203-205 and 211, etc.
Gilman vs. Philadelphia, 3 Wallace, 724-725.
Mobile vs. Kimball, 102 U. S., 702.
United States vs. 43 Gallons Whiskey, 93 U. S., 195.
Covington & Cincinnati Bridge Co., vs. Kentucky, 154 U. S., 204.
1 Farnham on Waters, Secs. 27 and 27a.

III.

THE LICENSING AND TAXING OF FOPPIANO BY THE STATE OF TENNESSEE FOR SELLING BEER AND LIQUORS ON THE STEAMBOAT "CHAS. H. ORGAN," WHILE THAT BOAT WAS USED AS A FERRY-BOAT AND WAS ENGAGED IN INTERSTATE COMMERCE UPON AND ALONG THE MISSISSIPPI RIVER BETWEEN THE STATE OF ARKANSAS AND THE STATE OF TENNESSEE, WAS A REGULATION OF COMMERCE UPON THE RIVER, AND BETWEEN THE STATE OF ARKANSAS AND THE STATE OF TENNESSEE, AND IN CONFLICT WITH THE POWER OF CONGRESS UNDER THE CONSTITUTION TO REGULATE SUCH COMMERCE, AND IN VIOLATION OF THE CONSTITUTION, AND VOID.

In Atlantic & Pacific Telegraph Co. vs. Philadelphia, 190 U. S., 160, these propositions as to the taxation by States and their municipalities of corporations engaged in carrying on interstate commerce, were declared to have been settled: (1) That the Constitution of the United States, having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation; (2) That no State can compel a party, individual or corporation to pay for the privilege of engaging in interstate commerce.

In Leloup vs. Mobile, 127 U. S., 648, the court said: "In our opinion, the fairest and most just construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportations of the subjects of

that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

In that case a telegraph company, doing the business of transmitting messages between different States, was required by a statute of Alabama to take out a license and pay a tax for the privilege. The court held (1) that telegraphic communications are commerce, and when carried on between States they are interstate commerce, and within the power of Congress to regulate, and free from the control of the State, except such regulations as are strictly of a police character. (2) That a State regulation by way of taxation on the occupation or business, or requiring a license to transact such business, is unconstitutional and void. (3) That a general license tax on a telegraph company, doing interstate business, affects its entire business, interstate as well as domestic or internal, and is unconstitutional.

The only questions left open in this case by the decisions just referred to are (1) whether or not the steamboat "Chas. H. Organ," when Foppiano was upon it, selling beer and liquors from the bar, was engaged in interstate commerce, and (2) whether Foppiano, personally or as a tenant, renting the bar on the boat, or as an aid, or assistant, in the navigation of it, or because he was on the boat, was also engaged in such interstate commerce.

The first question is conclusively determined in the case of Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196. It was held there that a steam ferry company, chartered as a corporation in New Jersey, engaged in transporting passengers and freight for hire across the Delaware River, from New Jersey to Philadelphia, was engaged in interstate commerce, and was not subject to taxation or exactions by the State of Pennsylvania.

The statute of Pennsylvania in question in that case required every corporation doing business in the State, or having capital employed there, to pay the State annually a specified tax. The court held that the ferry company was not liable for that tax.

In Gilman vs. Philadelphia, Justice Swayne, delivering the opinion, said: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary of all the navigable waters of the United States which are accessible from a State other than that in which they lie. For this purpose they are the public property of the Nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States, or otherwise, to remove such obstructions when they exist, and to provide by such sanctions, as they may deem proper, against the occurrence of the evil, and for the punishment of offenders. For these purposes Congress possesses all the power which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament of England."

3 Wallace, 724-725.

In Mobile vs. Kimball, 102, Justice Field said: "Commerce with foreign countries, and among the States strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined, there can be only one system of rules applicable alike to the whole country, and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce, as thus defined, may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce."

Page 702.

And see: The Roanoke, 189 U. S., 194-199.

Case of the State Freight Tax, 15 Wallace, 232, 275, etc.

In Gloucester Ferry Co. vs. Pennsylvania, after stating that it did not matter that the transportation was by ferry-boat, passing every hour, and that the means of transportation of persons or property did not change the character of the business, nor did the time required, nor the distance to be

traversed, Justice Field said: "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed; that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exaction. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety."

114 United States, pp. 203-204.

In the Wabash, St. Louis & Pacific Ry. Co. vs. Illinois, 118 U. S., 558, a paragraph of the syllabus is: "Notwithstanding what is there said (referring to Munn vs. Illinois, 94 U. S., p. 113, and other cases), this court holds now, and has never consciously held otherwise, that a statute of a State intended to regulate, or to tax, or to impose any other restriction upon the transmission of persons or property or telegraphic messages from one State to another, is not within that class of legislation which the States may enact, in the absence of legislation by Congress, and that such statutes are void, even as to that part of such transmission which may be within the State."

See page 575.

In United States vs. Holliday, 3 Wallace, 407, liquor was sold in the State of Michigan, and outside any Indian reservation, to an Indian of a tribe under charge of a United States Indian agent, but residing in the State, and a voter of the State, and it was contended, in defense of the indictment for the offense, that Congress had no power to enact legislation, operating as a police regulation, to enforce good morals within the State, or regulating commerce wholly within the State, among its own inhabitants or citizens.

The court overruled the defense, and held that Congress had the power to regulate by legislation commerce with individual Indians within the State, and that it was immaterial

what rights Michigan had conferred on the particular Indian involved.

3 Wallace, 416, etc.

And see: Head Money Cases, 112 U. S., 580, 591, etc.

The ruling in United States vs. Holliday was approved in United States vs. 43 Gallons Whiskey, 93 U. S., 194, where it was said that the power to regulate commerce "is in no wise affected by the magnitude of the traffic or the extent of the intercourse."

93 United States, 195.

In Gibbons vs. Ogden, Chief Justice Marshall said the real and sole question seemed to be whether a steam machine in actual use deprived a vessel enrolled for the coasting trade of the privileges conferred by its license. In considering that question he said the first idea which presented itself was that the laws of Congress for the regulation of commerce did not look to the principle by which vessels were moved. That subject, he said, was left entirely to individual discretion, and that in the vast complex system of legislative enactment concerning it, which embraced everything that the Legislature thought it necessary to notice, there was not, he believed, one word respecting the peculiar principle by which vessels were propelled through the water, except what might be found in one particular act (2d U. S. Statutes at Large, 694), granting a particular privilege to steamboats. He said with that exception every act, whether prescribing duties or granting privileges, applied to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. He said if a real difference could be admitted to exist between vessels carrying passengers and others, there was no fact in the case which could bring up that question.

If the occupation of steamboats was a matter of such general notoriety that the court might be presumed to know it, although not specially informed by the record, then he denied that the transportation of passengers was their exclusive occupation. It was a matter of general history that in Western waters their principal employment was the transportation of merchandise, and all knew that in the waters of the Atlantic they were frequently so employed.

9 Wheaton, 219-220.

In The Montello, 20 Wallace, 441, Justice Davis said: "The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are or may become the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either, in determining the navigability of a river."

Further down in the opinion he said: "The products of other States and foreign countries which arrived at Green Bay for points in the interior were formerly sent forward in Durham boats, and since the completion of the improvements on the river these products are reshipped in a small class of steamboats. It would be strange, indeed, if this difference in the modes of conducting commerce—both of which at the times they were employed were adapted to the necessities of the navigation—should operate a change upon the national character of a stream."

20 Wallace, 443.

Mr. Gould says: "The purpose of the navigation is immaterial, and those who pass upon the water for the purposes of pleasure, fishing or fowling have equal rights with those who navigate for business, trade or agriculture."

Gould on Waters, Sec. 86.

And 1 Farnham on Waters, Secs. 27 and 27a.

The agreed facts are that the steamboat "Chas. H. Organ" was duly enrolled and licensed for the coasting trade, and engaged in the navigation of the Mississippi River under that enrollment and license. The enrollment and license conferred all the authority the United States could grant to carry on the navigation and the interstate commerce, and such authority was complete and absolute. The State of Tennessee could not prohibit, or limit, or qualify, or annex any condition to that right of navigation or to carry on commerce, or require any additional license, or levy any tax upon the right to

carry it on. This was the question in Gibbons vs. Ogden, 9 Wheaton, 1. It was there held that the right of Gibbons to navigate the navigable waters between Elizabeth City and New York, and to carry on commerce upon them, was perfect, and that the law of New York granting the exclusive right to Fulton and Livingston was void.

9 Wheaton, 212, 214.

The decision in Harman vs. Chicago, 147 U. S., 396, is the same. It held that the City of Chicago, under the authority of the State of Illinois, could not require any license or levy any tax.

147 United States, 405.

And see 1 Farnham on Waters, Sec. 19b.

In the court below the Attorney General of Tennessee took the position (Record, pp. 51-52) that the proviso in the Act of the General Assembly prescribing the penalty for carrying on the business to be taxed, without having the license required, "but this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce," added nothing to the act, as the State could not tax, and did not intend to tax, commerce between the States. His position was that Foppiano, engaged in selling beer and liquors on the steamboat "Chas. H. Organ," "plying between Arkansas and Tennessee, was not engaged in commerce between the States." In its opinion the court took no notice of the proviso in the statute, but after stating that Tennessee could not tax the capital stock of the packet company, nor tax its boats, as they were engaged in interstate commerce, said the question was whether the principle involved prevented the exaction of a privilege tax from Foppiano, running a bar on one of the boats, "while at its landing within the jurisdiction of this State." It then said Tennessee could not impose a privilege tax for disembarking and discharging or gathering the passengers and cargoes, and added: "But can the same thing be said as to the privilege license required for maintaining a bar for the sale of spiritous liquors on one of its boats? So far as the agreed statement of facts shows, the charter conferred no right on the company to maintain a bar or rent the privilege of doing so to another, nor can we see that the exercise of such a privilege forms an essential part of the business which it is authorized to do."

The court then said further: "But, again, it is not disclosed that the liquors and beer dispensed to customers over the bar on the boat in question were brought into this State from Arkansas, or from any other foreign State, so as in any form to give the plaintiff in error the benefit of the interstate clause of the Federal Constitution, or any of the laws of Congress regulating commercial intercourse between the States. For all that appears in the Record, the intoxicants kept and sold at this bar may have been purchased in Tennessee by Harrell (Foppiano) for retail at the port of Memphis, within this State. If this be the fact, we can see no reason why the plaintiff in error, so retailing, should stand on any higher ground than the seller of drinks over the bar of any one of the saloons of that city." (Record, pp. 60-61.)

The attempt in this case was not to tax the beer and liquors as the property of Foppiano in Tennessee, and it is not material where Foppiano obtained them for the purposes of this controversy. The effort was to compel Foppiano to take out a license and pay a tax for carrying on personally a business made a taxable privilege.

It was not claimed that he had any place of business or carried on any business in the State of Tennessee, except the business of selling the beer and liquors on the steamboat "Chas. H. Organ." It is agreed his business was carried on only on the steamboat, and while it was navigating the Mississippi River, or landed, in the course of the navigation and commerce, on one side or the other of the river. The licenses granted him specify that he was to sell the beer and liquors on that steamboat.

In Tennessee a privilege is defined to be the exercise of an occupation or business which requires a license from some proper authority, designated by a general law, and not open to all, or anyone, without such license, and a privilege may be created and taxed in the discretion of the Legislature.

Mabry vs. Tarver, 1 Humphreys, 98;
Kurth vs. The State, 86 Tenn., 134;
And see: Coley on Taxation, Chp. 19, p. 403, etc., 410, etc.

But Tennessee cannot create a taxable privilege outside its jurisdiction, nor make a privilege of what a citizen has a

right to do without any license or tax, or of what he has a right to do under the Constitution, laws or treaties of the United States, without being licensed and taxed.

Whether the West Memphis Packet Company has power under its charter to maintain a bar on one of its steamboats, or to rent the privilege of doing so to Foppiano, is a question with which the Supreme Court of Tennessee had nothing to do.

It did rent the privilege to Foppiano, and Foppiano was in fact carrying on the bar and selling beer and liquors there. The State of Tennessee undertook to license and tax him because he was doing so, and upon the theory that he was doing a lawful business, and it cannot raise a question as to that fact in this suit. Besides, the West Memphis Packet Company holds its charter as a corporation from the State of Arkansas, and whether it has exceeded its corporate powers or not is a question between it and the State of Arkansas, exclusively, and a question the State of Tennessee has no right to raise in this suit.

It is of no consequence whether the Supreme Court of Tennessee saw, or did not see, that the exercise of the privilege of maintaining a bar on one of its steamboats, or renting the privilege to do so to another, "formed an essential part of the business which it (the West Memphis Packet Company) was authorized to do." As already stated, the court had nothing to do in this suit with the powers of the West Memphis Packet Company, or the manner of exercising them. It was for the West Memphis Packet Company to determine those questions for the purposes of this suit.

If the court meant, as it probably did, that a bar, or the keeping of a bar, on a steamboat, duly enrolled and licensed for the coasting trade under the Acts of Congress, and engaged in the navigation of the Mississippi River as a ferryboat, and carrying on commerce between the State of Arkansas and the State of Tennessee, is not an essential part of that business, the same answer may be made, namely, that it had no power in this suit to pass on that question. It could not determine what was essential or not essential to that business, as it had nothing to do with the control or regulation of it. That matter was with Congress, and whether Congress had

regulated it, or had not done so, need not have been considered in determining this case.

If there were regulations by Congress, they governed, and it has not been claimed in this case that they had been violated. If there were none, then it was to be conclusively presumed that Congress did not deem any necessary, and sanctioned the renting of the bar and the selling of the beer and liquors by Foppiano on board the "Chas. H. Organ," just as had been done, while it was employed as a ferry and used in interstate commerce. It must be treated as a fact, in this case, that the West Memphis Packet Company acted within its corporate powers, and that Foppiano carried on a lawful business, properly, on the "Chas. H. Organ," while navigating the Mississippi River, in selling the beer and liquors.

Mobile vs. Kimball, 102 U. S., 691, 697;
Escanaba Co. vs. Chicago, 107 U. S., 687;
Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 217.

In Robbins vs. Shelby Taxing District, 120 U. S., p. 489, Justice Bradley, after stating as settled these propositions: (1) That the power of Congress to regulate commerce with foreign nations and among the several States is necessarily exclusive whenever the subject is national in its character, or admits only of one uniform system, and (2) that the failure of Congress to regulate such commerce expressly, indicates its will that the subject shall be left free from all restrictions or impositions, and stating the only cases in which such commerce can be legitimately affected by State laws (120 U. S., 492-494), said: "In a word it may be said that in the matter of interstate commerce the United States are but one country, and are, and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject."

120 U. S., 494.

In Hall vs. DeCuir (95 U. S., 485) the statute provided that all those engaged in the transportation of passengers among the States, should give to all persons traveling in Louisiana, upon vessels employed in such business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color.

The "Governor Allen" was a steamboat enrolled and licensed for the coasting trade and employed in commerce between New Orleans and Vicksburg, touching at intermediate landings. Mrs. DeCuir was a person of color and took passage on a trip of the boat up from New Orleans for a landing in Louisiana. She was refused accommodation in the cabin set apart for white persons and brought suit to recover damages against the owners of the steamboat. The defense, among other things, was that the State statute attempted to regulate commerce among the States and was in conflict with the Constitution of the United States. The plaintiff had a verdict in the court of original jurisdiction and the judgment was affirmed by the Supreme Court of Louisiana, and a writ of error sued out to this court.

Chief Justice Waite, in the opinion, said, after giving instances in which the States may legislate, incidentally affecting interstate or foreign commerce, but not regulating it: "But we think it may safely be said that the State legislation which seeks to impose a direct burden upon interstate commerce, or interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed, after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of the passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State, must when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the Constitution was adopted."

Continuing, the Chief Justice said further: "The River Mississippi passes through or along the borders of ten differ-

ent States and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardships. Each State could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more—it could prescribe rules by which the carrier must be governed within the State, in respect to passengers and property brought from without. On one side of the river, or its tributaries, he might be required to observe one set of rules, and on the other, another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of the State line his passengers—both white and colored, must be permitted to occupy the same cabin, and on the other, be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route, is a necessity in his business, and to secure it Congress, which is untrammeled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign, and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages—exemplary, as well as actual, by anyone who felt himself aggrieved because he had been excluded on account of his color."

95 U. S., 489-490.

Foppiano's business in a general sense was the business of the West Memphis Packet Company. That company owned the steamboat "Chas. H. Organ" and had the right to navigate, and employ it just as it did, in commerce on the Mississippi River, in carrying freight and passengers between the State of Arkansas and the State of Tennessee. The object of the navigation and the commerce on the part of the Packet Company was to make money. To that end it had the right to regulate its own business in its own way. It did so—not only by collecting fares from the passengers on the steamboat,

and the charges for the freight carried, but by renting a portion of the steamboat to Foppiano in which to keep the bar, and from which to sell the beer and liquors, and collecting rent from him for that part. This was an aid to the Packet Company, as it determined in carrying on the navigation and commerce it was employed in, profitably, and was also, as it determined, for the comfort and convenience, if not for the necessary support of the people carried by the boat, or the people on the boat, for business or for pleasure. The rent increased the revenues of the business of the company, and the West Memphis Packet Company probably deemed Foppiano's business a means of increasing the number of the passengers on the boat, and a proper accessory of its business of carrying passengers and freight. Foppiano's sale of beer and liquors on board the steamboat was considered to add to the profits of the business of the Packet Company, and also to be for the comfort and pleasure of the passengers transported or to be transported. The Packet Company had the right to carry on the business of interstate commerce, and the business of ferriage across the river, so far as it was not trammeled by any law or regulation, in its own way and according to its own discretion. It had the right to employ as many people on board as it chose, and to designate their occupations, and all those people became the agents or instruments of the Packet Company for the carrying on of the commerce and ferriage it was engaged in. If Foppiano, as a bar-keeper on the steamboat, selling beer and liquors from the bar to those there desiring to purchase, was not strictly a mariner, he nevertheless was employed to assist, in a general sense, in the navigation and preservation of the steamboat, or at least in the support, comfort, business or pleasure of those being carried on the boat, or there for business or pleasure.

The term "mariner" is generally understood to include, not only the officers and ordinary seamen or helpers on board a ship or steamboat, but also to include surgeons, carpenters, coopers, stewards, and cooks employed on board as such. It may include women as well as men. The pilot, the deckhands, the engineers, and the firemen employed on board a steamboat have all been held to fall under the denomination of mariners. Why may not Foppiano, as a bar-keeper, selling beer and liquors to the passengers, be also considered as strictly a mariner? But he need not have been a mariner.

It is enough that the person employed on board the ship or steamboat, in whatever capacity, has to do with its equipment, or preservation, or renders services pertaining to the business of navigation or commerce, and that such services are necessary, or at least conducive to the preservation of the ship, or the steamboat, or the welfare of those employed in its navigation, or those being transported or accommodated on board the ship or steamboat, to constitute him a valuable instrument used in the navigation and commerce.

It is a well known fact that on the Mississippi River, all steamboats enrolled and licensed, and engaged in navigation and commerce, have on them bars at which beer and liquors are sold by bar-keepers, by retail to all persons applying on board to make purchases. Such bars are considered by the owners, navigating the steamboats engaged in the commerce to be necessary, or at least a proper and convenient appurtenance to the navigation of the boat, and the carrying on of the commerce. Bar-keepers are to be found upon every steamboat, just as bar-keepers and bars are to be found at every licensed hotel or tavern, in all the cities and towns of the country, where the sale of malt or spirituous liquor is not prohibited..

In the Commonwealth vs. Rogers (135 Mass., 539) Colburn, Judge, defined a bar to be a counter, table, shelf or other similar devices designed and used for the purpose of facilitating the sale and delivery of liquors, there kept, to any one who may apply for them, to be then and there drunk, not in connection with meals, lunches or food.

The bar-keeper may not be a necessity on the steamboat or ship, and no doubt many people consider him a nuisance, but that is not the commonly accepted idea—which is, that a steamboat or ship, engaged in navigation and commerce, would be wanting in proper equipment and facilities for the accommodation of the people on board, without a bar at which beer or liquors could be obtained upon application. This being so, it cannot be held that the keeping of the bar on the boat was completely outside the object and purposes of navigation and commerce, or that Foppiano took no part, and rendered no assistance in the equipment or preservation of the steamboat, or its business of navigation or commerce, or that

his services were not necessary, or were not conducive to the preservation of the steamboat, or the comfort or welfare of those on board, to be transported or accommodated, or those employed in the actual management and operation of the boat.

See: 1 Conkling's Admiralty, 107-109;
2 Parsons on Shipping and Admiralty, 182-183;
Spinetti vs. The Atlas Steamship Co., 80 N. Y., 71.

In State vs. Frappart (31 Louisiana An., 340) a steamboat owned in New Orleans and engaged in navigation and commerce upon the public navigable waters along the coast of Louisiana and Mississippi, had a bar on board, at which beer and liquors were sold. At one of the towns in Louisiana the bar-keeper was arrested for selling liquors without having a license as required by the law of the State of Louisiana. The Supreme Court of Louisiana held that he could not be licensed or taxed by the State for selling the liquors from the bar on board the steamboat, as doing so would be a regulation of commerce, and in violation of the Constitution of the United States.

The Supreme Court of Tennessee (Record, p. 64) conceded that that case sustains Foppiano's claim in this case, but said: "We are unable to agree with it, as in our view, the retailing of liquors does not in any way constitute commerce."

Now, why not? Has Congress made any discrimination in legislation between retailing liquors and other dealings, or transactions constituting interstate commerce? Has this court made any such discrimination, or can it do so?

Each Kentucky and Ohio incorporated a company to construct a bridge across the Ohio River at Cincinnati. Kentucky owns the river to low water mark on the Ohio side. After the company authorized to construct the bridge had been incorporated in both States, Kentucky undertook to prescribe charges to be collected by the company for passage over the bridge, and made the taking of rates, in excess of the charges prescribed, a criminal offense. The Bridge Company was indicted for violating the law, and the courts of Kentucky pronounced it guilty, and it sued out a writ of error to this court.

The court reversed the judgment and held, (1) that the traffic by the bridge across the river was interstate commerce; (2) that the bridge was an instrument of such commerce; (3)

that the statute of Kentucky was an attempted regulation of the commerce which Kentucky had no constitutional power to make, and (4) that Congress alone possessed the requisite power to enact a uniform scale of charges in such a case—the authority of the State being limited to fixing tolls on such channels of commerce as are exclusively within the territory of such State.

Covington & Cincinnati Bridge Co. vs. Kentucky, 154 U. S., 204.

In McCall vs. California (136 U. S., 104) a railroad company having a line of railroad between New York and Chicago established an agency in San Francisco for the purpose of inducing passengers going from San Francisco to New York, to take passage by its road at Chicago. The agent was not engaged in selling tickets for the route or receiving or paying out money on account of it. California undertook by statute to require a license and levy a tax upon the agency thus established. The validity of the statute was contested.

The Supreme Court of California decided it to be valid. This court reversed the judgment. The argument was made that the agency in California had no necessary connection with the commerce between Chicago and New York, and that the connection was so very remote and the hindrance of business was so insignificant that there could be no objection to the requirement of a license, or the levy of a tax upon the agency, and that such requirement did not interfere with interstate commerce.

In delivering the opinion, Justice Lamar said: "The essentiality of the business of the plaintiff in error to the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce. It may readily be admitted without prejudicing his defense that the road would continue to carry passengers between Chicago and New York, even if the agent had been prohibited altogether from pursuing his business in California. The test is, was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road

to an extent commensurate with the amount of business done by the agent."

136 U. S., 111.

The Constitution provides that no preference shall be given by any regulation of commerce or revenue, to the ports of one State over those of another, nor shall vessels bound to or from one State be obliged to enter clear or pay duties in another.

It also provides that no State shall, without the consent of Congress, lay any duty of tonnage.

These provisions recognize the fact that the States have ports, and that vessels pass from one State to another, and manifest the purpose clearly that there shall be no tax or duty imposed upon a vessel, or its owner, for passing, or for being in a port of a State to which it does not belong, nor discrimination made against him or it in a port of another State.

A State statute that the masters and wardens of a port of the State shall be entitled to five dollars in addition to other fees for every vessel arriving in the port, whether called on to perform services or not, has been held to be void, not only as a duty of tonnage, but as a regulation of commerce within the meaning of the Constitution.

Steamship Co. vs. Port Wardens, 6 Wallace, 31.

A tax imposed upon vessels by a State at so much per ton of the registered tonnage has been held to be a violation of the prohibition to levy any duty on tonnage, and void, although the vessels were owned by citizens of the State and engaged exclusively in trade between places within the State.

State Tonnage Tax Cases, 12 Wallace, 204.

A State statute imposing a tonnage tax to defray the expenses of local quarantine regulations on vessels owned in foreign ports entering a port of the State in pursuit of commerce has been held void as a regulation of commerce.

Peete vs. Morgan, 19 Wallace, 581.

In Cannon vs. New Orleans (20 Wallace, 577) an ordinance of New Orleans demanding of all steamboats mooring or landing in any part of that port a sum measured by the tonnage of the boat, was held to be a tax for the privilege of stop-

ping in the port, and a duty or tax or burden imposed for the privilege of arriving and departing from the port, levied under the authority of the State, and not compensation for the use of wharves, piers and similar constructions, and so to be void under the Constitution of the United States.

And see: Harman vs. Chicago, 147 U. S., p. 396.

In Moran vs. New Orleans (112 U. S., 69) an ordinance of the City of New Orleans requiring a license from persons owning and running towboats to and from the Gulf of Mexico and the city, and assessing a sum to be paid for such license, was held to be a regulation of commerce among the States, and void as a violation of the Constitution conferring on Congress the power to regulate such commerce.

In Henderson vs. The Mayor (92 U. S., 259) a statute imposed conditions on the ship master as a prerequisite to his landing his passengers, with an alternative, that in lieu he might pay a small sum of money for each one of them, and the court held that the statute levied a tax on the ship owner for the right to land the passengers, and, in effect on the passenger himself, since, if enforced, the ship master would make the passenger pay the tax in advance, as a part of his fare.

In that case the court reviewed City of New York vs. Miln (11 Peters, 103), and said all it decided was that the requirement from the master of a vessel that a catalogue of his passengers be rendered to the Mayor, with a description of them, was a police regulation of the State, and not inconsistent with the Constitution of the United States.

It also reviewed the Passenger Cases (7 Howard, 283), and said the result of them was that a tax demanded of the master or owner of the vessel for every passenger was a regulation of commerce by the State in conflict with the Constitution and laws of the United States, and therefore void.

In Chy Lung vs. Freeman (92 U. S., 275) the statute of California required a bond for certain enumerated classes of passengers from the ship owner, and the court found that the purpose of the statute was to extort money from that class, or to prevent their immigration, and that the statute operated directly on the passengers, and so was in violation of the Constitution.

In People vs. Compagnie Gen. Transatlantique (107 U. S., 59) the statute of New York imposing a tax on every alien passenger who should come by vessel from a foreign country to the port of New York and holding the vessel liable for the tax, was held to be a regulation of foreign commerce and void. And that the objection to the statute was not removed by the fact that its purpose was declared to be to raise money for the execution of the inspection laws of the State which authorized passengers to be inspected in order to determine who were criminals, paupers, lunatics, orphans, or infirm persons, without means or capacity to support themselves, and subject to become a public charge.

And see: Minnesota vs. Barber, 136 U. S., 313;
Bowman vs. Chicago & N. W. Ry. Co., 125 U. S., 488, etc.;
Leisy vs. Hardin, 135 U. S., 108, etc.

In Sinnot vs. Davenport (22 Howard, 227) the State of Alabama had a law requiring the owners of steamboats navigating the waters of the State, before such boats should leave the port of Mobile to file a statement in writing in the office of the Probate Judge, setting forth (1) the name of the vessel; (2) the name of the owner, or owners; (3) his or their place or places of residence, and (4) the interest each had in the vessel.

A steamboat was engaged in navigation and commerce between New Orleans, La., and Mobile and Wetumpka, Ala. Its owners contested the validity of the law. This court held that as the vessel was enrolled and licensed under the act of Congress for carrying on the coasting trade, the law was void as to it, because in conflict with the Constitution empowering Congress to regulate commerce with foreign nations and among the several States.

In the next case, Foster vs. Davenport (22 Howard, 244), the same principle was extended to a steamboat employed at Mobile as a lighter and towboat, sometimes towing vessels beyond the outer bar of the bay, and into the gulf to the distance of several miles—the court holding that the character of the navigation and business in which the boat was employed could not be distinguished from that in which the vessels which were towed or unloaded were engaged.

And see: Harman vs. Chicago (147 U. S., 396) where, in showing that the State could not license, and that the licenses granted by the United States, conferred the rights, Justice Field said: "These privileges cannot be separated from the trade, and cannot be enjoyed unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it conveys the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade, would be, we think, to disregard the apparent intent of the act."

147 United States, 405;

And see: Gibbons vs. Ogden, 9 Wheaton, 213.

In Pickard vs. The Pullman Southern Car Co. (117 U. S., 34) a statute of Tennessee imposing a privilege tax upon every sleeping car used or running over a railroad in Tennessee not owned by the railroad on which it was run or used, was held to be void, so far as it applied to interstate transportation of passengers carried over a railroad in Tennessee, into or out of, or across Tenessee, in sleeping cars, owned by a Kentucky corporation, and leased by it for transportation purposes to a Tennessee railroad company—the latter company receiving the transit fare, and the former, the compensation for the sleeping accommodations.

117 United States, 48-51.

This case was followed by Allen vs. The Pullman Palace Car Co. (191 U. S., 171), where a distinction was taken as follows: "A State may not impose a tax which is in any way a burden upon interstate commerce, but it may impose a privilege tax upon corporations, engaged in interstate commerce, for carrying on that part of their business which is wholly within the taxing State, and which tax does not affect their interstate business, or their right to carry it on in that State."

In Kelley vs. Rhoads (188 U. S., 1) a herd of sheep, driven at a reasonable rate of speed, from a point in Utah across the State of Wyoming, a distance of about five hundred miles, to a point in Nebraska, for the purpose of shipment by rail, from the latter point, was held to be property engaged in interstate commerce to such an extent as to be exempt from

taxation by the State of Wyoming, under a statute taxing all live stock brought into the State for the purpose of being grazed. It was held that the fact that the sheep were maintained by grazing along the route, and that the owner could have shipped them to their ultimate destination from a point on the same railroad, which could have been reached from the starting point, without entering Wyoming, was not material and did not change the result.

It has been held a number of times that a tax upon an agent delivering to the purchaser in the State, levying the tax, goods sold in another State, and there delivered to a carrier, to be transported to the taxing State, and delivered to the agent, to be in turn delivered to the purchaser, is an interference with and a tax upon interstate commerce and therefore unlawful.

Caldwell vs. North Carolina, 187 U. S., 622;
Norfolk & Western Ry. Co. vs. Sims, 191 U. S., 441;
Kehrer vs. Stewart, 197 U. S., 65.

In Crutchcer vs. Kentucky (141 U. S., 47) it was held that a State law requiring a license from an agent of a foreign express company, doing business in the State, was void so far as it applied to a corporation of another State, engaged in interstate commerce, although such express company, as incidental to such interstate business, did some local business by carrying goods from one point to another in the State.

In Guy vs. Baltimore (100 U. S., 434) the court held an ordinance exacting from vessels using the public wharves of the city and laden with products of other States, higher rates of wharfage than from vessels using the same wharves and laden with products of Maryland, a taxation upon interstate commerce, and therefore void.

In Walling vs. Michigan (116 U. S., 446, 455) a statute imposing a license tax upon persons not residing or having their principal place of business in Michigan, but whose business was that of selling or soliciting the sale of intoxicating liquors to be shipped into the State, from places without, a similar tax not being imposed in respect of the sale, and soliciting for sale, of liquors manufactured in Michigan, a regulation of and tax upon interstate commerce and void.

And see: Brummer vs. Rebman, 138 U. S., 78.
Stockard vs. Morgan, 185 U. S., 27, is similar.

A license and tax required of a railroad company created by another State, and whose railroad is a link in a through line of road, for freight and passengers, carried into the State from other States, and from that State to other States, for the privilege of keeping an office in the State for the use of its officers, stockholders, agents and employes, is a tax upon commerce among the States and void.

Norfolk & W. R. R. Co. vs. Pennsylvania, 136 U. S., 114.

The difficulty of distinguishing the cases which fall properly within the police power of the State, as it is usually termed, and those which are beyond that power, because the Constitution of the United States governs them, is sufficiently manifest from the examination of such cases as New York vs. Miln (11 Peters, 102); The Passenger Cases (Smith vs. Turner, 7 Howard, 283); Henderson vs. The Mayor of New York (92 U. S., 259, and The Central of Georgia Ry. Co. vs. Murphey (196 U. S., 194).

Justice Miller said, in delivering the opinion in Henderson vs. The Mayor of New York, that the power which had been frequently referred to in the decisions of the court as the police power, whatever may be its nature and extent, or the urgency for its use, cannot be exercised by a State in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution.

He continued: "Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may at the same time be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of currency, and for the safety of the government which issues it. It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable. But, however difficult this may be, it is clear from the nature of our complex form of government that whenever the statute of a State invades the domain of the legislation which belongs exclusively to the Congress of the United States, it is void, no

matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States."

92 United States, 271-272.

In The Central of Georgia Ry. Co. vs. Murphy the statute of Georgia in question required the initial carrier or any connecting carrier, of freight, to inform the shipper in writing, when, where, and how, and by which carrier freight had been lost, damaged, or destroyed, where loss, damage or destruction had occurred, and giving the names of the parties and their official positions, by whom the truth of the facts set out could be established, and the Supreme Court of Georgia held that the statute applied to shipments between the States, and sustained the law, so construed, as a valid law. This court reversed that judgment. It held that the statute was a violation of the commerce clause of the Federal Constitution, as it imposed a burden upon interstate commerce.

In delivering the opinion, Justice Peckham said: "The power to regulate the relative rights and duties of all persons and corporations within the limits of the State cannot extend so far as to thereby regulate interstate commerce. The police power of the State does not give it the right to violate any provision of the Federal Constitution. Being of the opinion that the statute in question, when applied to an interstate shipment, is a regulation of interstate commerce, we must hold the statute so far as it affects such shipments to be void on that account."

196 United States, 206.

The question to be decided in all cases of conflict between the National and the State law is not the extent of the police power of the State, for that can never supplant the Constitution of the United States, but whether the legislation in question violates some provision of that Constitution, or some Act of Congress, or some treaty made by the United States.

Brennan vs. Titusville, 153 U. S., 289;
Gibbons vs. Ogden, 9 Wheaton, 209;
Railroad vs. Husen, 95 U. S., 465;
Bowman vs. Chicago & N. W. Ry. Co., 125 U. S., 488, etc.;
Leisy vs. Hardin, 135 U. S., 108, etc.;
Crutcher vs. Kentucky, 141 U. S., 59-62;
Minnesota vs. Barber, 136 U. S., 313;
Brimmer vs. Rebman, 138 U. S., 78.

In Allgeor vs. Louisiana (165 U. S., 578) a statute of Louisiana made it a penal offense for any person to do an act in that State to effect insurance on property then in the State in any marine insurance company which had not complied with the laws of the State.

The court held that when applied to a contract of insurance made in New York, with an insurance company of that State, where the premiums were paid, and where the losses were to be paid, the statute was a violation of the Constitution of the United States. It was sought to support the statute upon the ground that it was an exercise by the State of Louisiana of its police power. In answer the court said: "Such a statute as this in question is not due process of law because it prohibits an act which, under the Federal Constitution, the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police or other powers, as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of a citizen which are protected by the Federal Constitution. In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced, the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property, or to do business within the jurisdiction of the State, may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State, as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts, of the nature involved in this case, outside the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction; nor can the State legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may, at the time when such insurance attaches, be within the limits of the State. The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits, while he himself remains within it."

165 U. S., 591-592.

IV.

THE STATE OF TENNESSEE, BY ITS CONSTITUTIONS FROM THE ORGANIZATION OF THE STATE IN THE YEAR 1796, HAS PUT ITS RIGHT OF ADMISSION AS A STATE OF THE UNION ON THE CESSION BY NORTH CAROLINA OF THE TERRITORY NOW COMPOSING THE STATE OF TENNESSEE TO THE UNITED STATES, AND HAS RECOGNIZED THE ORDINANCE OF CONGRESS OF THE YEAR 1787 FOR THE GOVERNMENT OF THE NORTHWEST TERRITORY, AND THE PORTION OF THAT ORDINANCE SECURING THE FREE USE OF THE NAVIGABLE WATERS TO ALL THE PEOPLE WITHOUT ANY TAX, DUTY OR IMPOST THEREFOR, AS THE FUNDAMENTAL LAW, AND HAS DECLARED THAT AN EQUAL PARTICIPATION IN THE FREE NAVIGATION OF THE MISSISSIPPI RIVER IS ONE OF THE INHERENT RIGHTS OF ITS CITIZENS, AND CANNOT BE CONCEDED TO ANY PRINCE, POTENTATE, POWER, PERSON, OR PERSONS WHATEVER, AND BY THE STATUTE UNDER WHICH FOPPIANO HAS BEEN LICENSED AND TAXED, AS APPEARS IN THIS RECORD, HAS ENACTED THAT THE INHIBITION AS TO EXERCISING ANY TAXABLE PRIVILEGE, INCLUDING THE SELLING OF BEER AND LIQUORS ON STEAMBOATS, FLATBOATS OR OTHER VESSEL, OR WATER CRAFT, "SHALL NOT APPLY TO ANY PERSON, FIRM OR CORPORATION ENGAGED IN INTERSTATE COMMERCE." (ACTS OF TENNESSEE OF 1903, CHAP. 257, SEC. 16, PP. 629-630.)

THE STATE OF TENNESSEE, THEREFORE, HAS PRECLUDED ITSELF FROM LICENSING AND TAXING FOPPIANO FOR SELLING BEER AND LIQUORS ON THE STEAMBOAT "CHAS. H. ORGAN" WHILE NAVIGATING THE MISSISSIPPI RIVER,

AND ENGAGED IN COMMERCE BETWEEN THE STATE OF TENNESSEE AND THE STATE OF ARKANSAS. IN UNDERTAKING TO DO SO IT HAS DEPRIVED FOPPIANO OF A PRIVILEGE AND IMMUNITY SECURED TO ITS CITIZENS, AND HAS ABRIDGED HIS PRIVILEGES AND IMMUNITIES AS A CITIZEN OF THE UNITED STATES, AND HAS DEPRIVED HIM OF HIS LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW, AND HAS DENIED TO HIM THE EQUAL PROTECTION OF ITS LAWS, AND THUS, HAS VIOLATED THE CONSTITUTION OF THE UNITED STATES.

If the citizens of Tennessee have the right to the free navigation of the Mississippi River secured to them by their constitution, or by the compact between the United States and North Carolina, or in any other way, how can the State of Tennessee, under the Constitution of the United States, deny the same right to all the other citizens of the United States? How could the State require a license from Foppiano, or tax him for the use of the river, as it has undertaken to do in these cases, and not violate the Constitution of the United States?

It is only necessary to read the preamble to each of the three constitutions of the State of Tennessee to verify in part the facts on which the above position is based. Those preambles refer to the cession by North Carolina to the United States of the territory constituting the State, as the foundation of the right of admission of the State to the Union, and to the Ordinance of 1787, of Congress, for the government of the Northwest Territory, as a component part of the compact of cession, made between the United States and North Carolina. The provision that the navigable waters should forever remain free, without any tax, duty or impost, was one of the most important to the people, then living, contained in the ordinance. It was so important that the people made the provision for the free navigation of the Mississippi River a part of the constitution they formed when they asked Congress to admit Tennessee as a State. Before the Constitution of 1834 was adopted, Spain and France successively had disappeared as sovereigns of the territory, bordering Tennessee, and Arkansas, before then an organized Territory of the United States, was about to be admitted as a State, and embraced all the ter-

ritory opposite Tennessee on the Mississippi River, which Spain or France had ever controlled. There was then no danger of taxes, imposts, duties or tolls to be imposed by any foreign power for the navigation of the Mississippi River, nor any probability of its free navigation being burdened or interfered with, except by the action or under the authority of the United States, or some State of the Union fronting the river. In this condition of affairs, the provision as to the free navigation of the river was retained in the Constitution of 1834, in the same words as in the Constitution of 1796. And even after the end of the Reconstruction period, when a new constitution, to meet the changed conditions, which had been brought about by the momentous events of the years preceding and following 1861, was deemed appropriate, the people still had the idea that the navigation of the Mississippi River was one of those facts and rights which could not safely be allowed to rest on general provisions, or abstract declarations, in either the National or State Constitutions, and so they again put into their Constitution of 1870 the provision as to the free navigation of the river from the Constitution of 1796. They never claimed any exclusive right to the navigation of the river, or any part of it, but only an equal participation in the free navigation. When Spain owned the west bank, they conceded in their constitution the equal right of the inhabitants, or those who were not citizens of Tennessee, to the free navigation of the river, and they have never denied in their organic law, or any express law, in any way, the equal right of the inhabitants of Arkansas as a Territory, or as a State, or of the other citizens of the United States, to such free navigation. For more than a hundred years no attempt was made by the Legislature of Tennessee, or those executing its laws, to levy a tax, duty, impost or toll on those navigating the river, or to compel persons using the river to take out a license or pay a tax for such use.

As stated above, in the acts providing revenue, of the years 1899, 1901 and 1903, and requiring licenses, and the payment of taxes by those selling liquors or beer from boats and vessels, and making it a misdemeanor to make sales without the license, and the payment of the tax, it was specially provided that the inhibition should not apply to any one engaged in interstate commerce.

In the court below the Attorney-General said this provision meant nothing as the State could not and did not intend to tax commerce between the States. (Record, p. 52.) In view of the three constitutions of Tennessee, and in the light of the history of the right to the free navigation of the Mississippi River, it was full of meaning and indeed of wisdom. The State wanted it understood that it had not repudiated, and did not repudiate, its historical and constitutional position with reference to the free navigation of the Mississippi River. For years after the law was first enacted, requiring licenses and taxes from persons selling beer and liquors from boats and vessels, no attempt was made to enforce it on the Mississippi River.

Foppiano was probably the first victim whose offense consisted in, or liability rested on the sale of liquors and beer on a steamboat, duly enrolled and licensed for the coasting trade, and engaged in navigation and commerce on the Mississippi River.

The omission to license and tax the selling of beer and liquors on boats and vessels on the Mississippi River for so long a time was a practical construction by the people and government, of the constitution of the State of Tennessee, as to the right of the free use of the Mississippi River, and is entitled to as much consideration, and the same effect as the judicial decisions of its courts.

Stuart vs. Laird, 1 Cranch, 299;
Martin vs. Hunter, 1 Wheaton, 304, 351;
Cohens vs. Virginia, 6 Wheaton, 264, 418;
Bank U. S. vs. Halstead, 10 Wheaton, 51, 63;
Ogden vs. Saunders, 12 Wheaton, 290;
Minor vs. Happersett, 21 Wallace, 162, 177, etc.;
Union Ins. Co. vs. Hoge, 21 Howard, 35, 68;
Edwards vs. Darby, 12 Wheaton, 206;
Brown vs. U. S., 113 U. S., 568, 570, etc.;
Cooley's Constitutional Limitations (6th Ed.), Chap. 4, p.81, etc.

Before the advent of railroads, the Mississippi River was covered with steamboats and other water craft, employed in navigation and commerce. The number probably has not increased since carriage by railroads has supplanted carriage by

water to a large extent. But, the number of the boats and vessels on the Mississippi River is still large. Thousands and thousands of them, engaged in navigation, local or transient, have landed and moored at and cleared from Memphis every year for seventy-five or a hundred years. Probably every steamboat had its bar at which beer and liquors were sold by retail. None of them were licensed or taxed, or supposed to be subject to license, or liable to taxation. It required the astuteness of the alert revenue agent, who instituted the proceeding against Foppiano in the year 1903, to discover those facts.

In The New York Indians (5 Wallace, 767) the court, in denying the right of the State of New York to tax the lands of the Indians, mentioned the fact that the attempt before it was the first that had ever been made to levy a tax.

It is true that the constitution of Tennessee does not name commerce on the Mississippi River as an inherent right of its citizens, and mentions only "free navigation," as one of their inherent rights. But navigation without commerce would be a right not worth possessing. (Harman vs. Chicago, 147 U. S., 405.) If its citizens could not freely trade, or have free commercial intercourse with the inhabitants along, or upon the river, the freedom of passing over or across it would have been of little practical benefit. It was the commerce on the river that was the matter in controversy with Spain. It was that commerce the people of Tennessee intended to declare was "one of the inherent rights of the citizens of the State," and could not be conceded to any one. Navigation and commerce, in a maritime country cannot well be separated, or rather the one necessarily embraces the other. The same must be true on a great river like the Mississippi, forming the boundaries of States, and floating millions and millions of dollars invested in commerce. In its legislation Congress has treated navigation and commerce as practically convertible terms, under the title "Commerce," or "Commerce and Navigation."

Brightley's Digest of the Laws of the United States (1789-1859), p. 156, etc.;

Revised Statutes U. S., Title 48, p. 800, etc.

This court may not have decided in terms that navigation embraces or includes commerce, but its decisions assume that

fact, and it has many times decided that the right of Congress to regulate commerce includes navigation, and the possession and control and the right to regulate the use of all the public navigable waters of the United States.

Gibbons vs. Ogden, 9 Wheaton, 190, etc.

What the people of Tennessee intended to assert, and secure their right to in their constitutions was the unlimited and illimitable free use by the citizens of the State, of the Mississippi River, in any and every possible lawful way, and for any and every lawful purpose, and free from any and all control, of any description or character, or from any possible power or source, and the provision of the constitutions is to be interpreted to accomplish effectually what they intended by it to secure and preserve to themselves, rather than literally or technically.

Cooley's Constitutional Limitations (6th Ed.), Chap. 4, pp. 69-71.

We repeat, therefore, that the right of every citizen of Tennessee to the free use of the Mississippi River, without any tax, duty, impost or toll is a right fixed in him by the constitution of the State, as an inherent right, and hence, under the Constitution of the United States, belongs to Foppiano, and he, and every other citizen of the United States has, and must be conceded the same right, to be enjoyed in the same way.

The judgment of the Supreme Court of Tennessee has deprived Foppiano of his right, and should be reversed.

We do not see that the License Cases (Smith vs. Turner) have anything to do with the questions in this case. There were three of them—one from Massachusetts, one from Rhode Island, and one from New Hampshire. The law of Massachusetts prohibited the sale of less than 28 gallons, and the law of Rhode Island, less than 10 gallons of wines, or spirituous liquors, without a license. The defendants were indicted for selling without the required licenses and convicted. Their defense, each, was that their wines or liquors were foreign, and as importers they had the right to sell them. The law of New Hampshire also required a license, and the selectmen of the town had the discretion to grant or refuse the license. The defendant in that case was indicted for selling without a license. His defense was that the liquor he sold had been brought in from another State, and he sold it in the orig-

inal package. He also was convicted. This court affirmed each conviction. It put the Massachusetts and Rhode Island cases on the ground that the laws of those States dealt with the wines and liquors after they had passed beyond the limits of foreign commerce, and that while the States were bound to receive the foreign wines and liquors, and to permit a sale of them by the importer, because Congress had authorized the importation, they were not bound to furnish markets for the sales. The New Hampshire case was put on the ground that as Congress had not regulated as to interstate commerce, the law of New Hampshire was not void, as it came in conflict with no regulation Congress had made.

5 Howard, 504, 573, etc.

It is the ruling in the New Hampshire case, we suppose, which the Supreme Court of Tennessee, in its opinion in this case, meant to say, has been, in effect, overruled by the cases of Bowman vs. Chicago & N. W. Ry. Co. (125 U. S., 465), and Leisy vs. Hardin (135 U. S., 100), when taken together.

THE SUPREME COURT OF TENNESSEE SAID IN ITS OPINION (Record, p. 61) "with regard to the retailing of intoxicants, there has never been a question as to the right of the several States to control the subject."

Has there ever been any question as to their right to regulate any portion of their internal commerce, or matters of police wholly within the State? The court added in its opinion: "The long line of cases found in the reports of the Supreme Court of the United States agree in affirming the general proposition that the regulation of the manufacture and the sale of intoxicating liquors is peculiarly under the control of the States, and within their police power, which has not been surrendered to the Federal Government." (Record, p. 61.) Have the cases referred to, where the regulation of interstate commerce was the question, made any discrimination between the manufacture and sale of spirituous liquors and any other article of commerce? And if so, what is the distinction? What case or cases establish it? It is not necessary to point to a long line of them—one will do.

The court, in its opinion, almost immediately referred to Bowman vs. Chicago & N. W. Ry. Co. (125 U. S., 465), and Leisy vs. Hardin (135 U. S., 100), each showing that spirituous liquors or beer, when a question of interstate commerce

is for decision, stand upon the same footing and are treated just as any other article of commerce is treated.

The correctness of our position is sufficiently shown by such cases as Bowman vs. Chicago & N. W. Ry. Co.; Leisy vs. Hardin; Lyng vs. Michigan (135 U. S., 161); Bartemeyer vs. Iowa (18 Wallace, 129); Rhodes vs. Iowa (170 U. S., 412), and Mugler vs. Kansas (123 U. S., 423).

The powers of the State and those of the National Government, respectively, with reference to commerce, internal or interstate, or matters of police wholly local, in no way depend on the particular article involved, or the morality or immorality of the act in question, but on the division of the powers made in the Federal Constitution, between the National and State Governments, giving to the one those pertaining to relations with foreign governments, and between the States, and to the other those that concern immediately and directly only the people of the particular State.

Jacobson vs. Massachusetts, 197 U. S., 11, 25.
Matter of Heff, 197 U. S., 488, 505, etc.

The Wilson Act (26 U. S. Statutes at Large, Chap. 728, p. 313) provides: "That all fermented, distilled and other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

It is not necessary to argue to this court that there is nothing in it affecting the questions in this case. To support our position, we refer to the cases already decided.

In re Rahrer, 140 U. S., 545;
Rhodes vs. Iowa, 170 U. S., 412;
Vance vs. W. A. Vandercook Co. (No. 1), 170 U. S., 438;
Norfolk & Western Ry. Co. vs. Sims, 191 U. S., 441;
American Express Co. vs. Iowa, 196 U. S., 133;
Cook Co. vs. Marshall, 196 U. S., 261.

The case of Wiggins Ferry Co. vs. City of East St. Louis (107 U. S., 365) has no application to this case. Here the license and tax were demanded by the State of Tennessee, and the West Memphis Packet Company, the owner of the steamboat "Chas. H. Organ," and navigating it, and having the right to carry on the ferry, and engaged in commerce, across the Mississippi River, was a corporation of, and resided in Arkansas, and maintained the ferry under a license from the State of Arkansas.

In the Wiggins Ferry Co. vs. East St. Louis, the company was a corporation of Illinois, and the ferry was carried on under the authority of that State, and the tax in controversy was levied upon the privilege of carrying on the ferry from the Illinois shore.

The case of Louisville & Jeffersonville Ferry Co. vs. Kentucky (188 U. S., 381) is the reverse of that case and similar to this present case.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
Of Counsel for James Foppiano.

Memphis, Tennessee, September 11, 1905.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

JAMES FOPPIANO, *Plaintiff in Error,* *vs.* **ROBERT A. SPEED, CLERK, ETC.,** *Defendant in Error,*	**No. 67**
AND	**Error to the Supreme Court of Tennessee.**
JAMES FOPPIANO, *Plaintiff in Error,* *vs.* **ROBERT A. SPEED, CLERK, ETC.,** *Defendant in Error.*	**No. 68**

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

CHARLES T. CATES, JR.,
Attorney-General of Tennessee.

S. B. NEWMAN & CO., KNOXVILLE.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905

JAMES FOPPIANO,
Plaintiff in Error,
vs.
ROBERT A. SPEED, CLERK, ETC.,
Defendant in Error.
No. 67

AND

JAMES FOPPIANO,
Plaintiff in Error,
vs.
ROBERT A. SPEED, CLERK, ETC.,
Defendant in Error.
No. 68

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

May it Please Your Honors:

Because, in our opinion, the precise question to be determined by this honorable court, and the material facts upon which its solution depends, are somewhat obscured in the elaborate and exhaustive brief of the learned counsel for plaintiff

in error, it is thought proper, with the permission of the Court, to re-state the case, and the sole point involved therein, as it is viewed by the defendant in error.

STATEMENT OF QUESTION TO BE DETERMINED.

The sole question to be determined in these cases is whether the plaintiff in error, engaged in the business of selling by retail beer and liquors upon a steam ferry boat, plying between Arkansas and Tennessee, and while said boat is moored to its wharf at Memphis within the territorial limits of Tennessee, is subject to the laws of Tennessee regulating such business, and taxing persons engaged therein within her borders.

STATEMENT OF FACTS.

These cases were tried upon an agreed statement setting out, among others, the following material facts:

(1) During the years 1901, 1902 and 1903, the plaintiff in error, James Foppiano, under lease or contract with the West Memphis Packet Company, was the proprietor of the bar privileges on a certain steam boat, "Charles H. Organ," and thereon, while the same was in transit across the Mississippi River and moored at its landing place in Memphis, Shelby County, Tennessee, was engaged in selling at retail beer and liquors, not only to persons who were on said steamboat for the purpose of being transported across said river, but also to all persons who were thereon and who made application to purchase such liquors.

(2) Said steamboat, "Charles H. Organ," was owned by said Packet Company, which was chartered under the laws of the State of Arkansas, "to buy or build and own one or more steam boats, barges and flat boats, and other water craft, to be used in transporting freight and passengers on the Mississippi

River, and the lakes, bayous and other navigable streams connecting therewith within the limits of the State of Arkansas;" and for several years, under the authority of a license issued by the County Court of Crittenden County, said Packet Company had been operating a ferry across the Mississippi River, from points in Arkansas, to Memphis in Shelby County, Tennessee, using said steam boat as a ferry boat, which carried both freight and passengers and made regular trips and had certain and designated landing places in both states. Said steam boat was duly enrolled and licensed as a steam vessel under the laws of the United States, in the Federal Customs House at Memphis, Tennessee, the nearest and home port of said steam boat.

(3) The State of Tennessee, pursuant to her policy to regulate the liquor traffic, wherever carried on within her borders, has absolutely prohibited the sale of intoxicating liquors, etc., within many localities, and has declared such traffic, even in places where it is not absolutely prohibited, "a privilege" to be exercised only upon the payment of a specific license fee or tax, issued under stringent regulations, and, in default of which, engaging in such traffic is declared to be a misdemeanor. The statutes of Tennessee in force during the years above named, and material to the precise question before your honors, were enacted in 1899, 1901 and 1903, and, because the provisions of the acts of 1899 and 1901, in so far as they relate to the matter under consideration, are practically identical with the acts of 1903, Chapter 257, it is deemed necessary to notice only those provisions of the latter act bearing upon the question before the court.

By Section 4 of Chapter 257 of the Acts of 1903, it was enacted:

"That each avocation, occupation and business hereinafter named in this section is declared to be a privilege and the rate

of taxation upon such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk, as provided by law for the collection of revenue."

* * * * * * * * * * * * * *

LIQUOR DEALERS.

* * * * * * * * * * * * * *

"Persons selling beer, or any quantity of liquors on steam boats, flat boats or any other vessel or water craft, or from railroad cars, shall pay a tax, each, in lieu of all other taxes, to be paid in any county they may elect, per annum, $200.00."

By Section 16 of said act it was further enacted:

"That it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all persons so offending shall be liable to a fine of not less than $10.00 nor more than $50.00 for each day such privilege is exercised without license; but this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce.

Acts of 1903, Chapter 257, pp. 629-630.

(4) The plaintiff in error engaged as aforesaid in selling liquors at retail upon said steam boat, paid no license fee or tax therefor, and, the facts coming to the knowledge of the proper officials of Tennessee, they, instead of instituting a criminal prosecution against him for his failure to take out a license and pay the tax prescribed, took steps to compel him to take out a license to cover current business and to pay the license fees or taxes in arrears for the years above mentioned.

Record, pp. 2, 3, 8, 9, 10, 11.

CONTENTION OF FOPPIANO AND ACTION OF STATE AUTHORITIES.

Foppiano contended that he was not subject to the authority of the State of Tennessee and that the said state had no jurisdiction over him, because his sales were only upon a steam boat engaged in commerce between the states of Tennessee and Arkansas upon the waters of the Mississippi River, which was free to all navigation and commerce, he, likewise, was engaged in interstate commerce,—notwithstanding he was engaged in selling liquors at retail while said steam boat was within the territorial limits of Tennessee and moored at its landing at Memphis.

The county court clerk of Shelby County, the defendant in error herein, who was charged in the first instance with the duty of determining the question and collecting the tax, if it were due, decided adversely to plaintiff in error, who thereupon appealed to the State Board of Equalization, where the action of the county court clerk was affirmed. Thereupon Foppiano paid the license fees or taxes under protest and to recover same instituted two suits in the Circuit Court of Shelby County, which coming on to be heard on the agreed statement of facts found in the record, were dismissed. Foppiano thereupon appealed to the Supreme Court of the State of Tennessee.

OPINION AND JUDGMENT OF THE SUPREME COURT OF TENNESSEE.

The two cases instituted by the plaintiff in error, Foppiano, were consolidated in the Supreme Court with the case of Leslie L. Harrell vs. Robert A. Speed, clerk, etc., involving the same question, and said Foppiano and Harrell having duly assigned errors, in conformity with the practice of that court, the cases,

as consolidated, were heard before said court which, in substance, held and adjudged:

(1) **That the western boundary of the State of Tennessee is the middle line of the main channel of the Mississippi River and to that line the jurisdiction of Tennessee extends.**

(2) **That persons engaged in selling at retail intoxicating liquors on a steam boat within the jurisdictional limits of Tennessee are liable for the license fee or tax fixed by the statutes of that state.**

(3) **That the retailing of intoxicating liquors on a steam boat within the jurisdictional limits of Tennessee is not itself interstate commerce, even though said steam boat may be engaged in commerce between the states.**

In determining said cases separate opinions were filed.

The opinion in the Foppiano case is found in the

Record, pp. 57, 59.

The opinion in the Harrell case is found in the

Record, pp. 60, 64.

The opinion in the Harrell case was, by judgment of the court, made a part of the record in the Foppiano case.

Record, p. 65.

Both opinions are officially reported.

Foppiano case, 113 Tenn., 167.

Harrell case, 113 Tenn., 224.

It is to review the judgment of the Supreme Court of Tennessee, adverse to his contention, that plaintiff in error has sued out a writ of error.

BRIEF AND ARGUMENT.

I.

It is earnestly insisted under the first assignment of error, that the business of plaintiff in error is not subject to the laws of the State of Tennessee, enacted under either the police or taxing power of the state, because:

(1) By the constitution of Tennessee and the several treaties between the United States, Great Britain, France and Spain, referred to in the elaborate and exhaustive brief of counsel for plaintiff in error, he, as a citizen of the United States and a resident of the Mississippi Valley, is protected in the navigation of the waters of the Mississippi River, free from any tax, license or impost, and entitled to the untrammeled use of the waters of said river in their natural condition.

(2) That when on said steam boat he was outside of the jurisdiction of Tennessee, even while said boat was between the middle thread of the main channel of the Mississippi River and the eastern shore thereof, or while said steam boat was moored at its landing in the City of Memphis, Tennessee.

We believe that the foregoing propositions embody a fair statement of the contention made on behalf of the plaintiff in error, which his learned counsel have endeavored to sustain by citations from many works of historical interest and numberless decisions of this court. It is difficult to perceive how or in what way these works of interest to a student of history, or the authorities named in the brief, bear upon the precise question before this court and we shall not endeavor to review or notice each and all of the decisions relied on, because to do so could not serve any useful purpose, but would only result in further obscuring the real and only question before this court for its determination. For this reason, the court will pardon us for not endeavoring to analyze or closely follow the authorities

cited to sustain the several positions assumed on behalf of the plaintiff in error, but permit us to present the question in our own way.

We concede:

(1) That plaintiff in error, if he is a citizen of Tennessee, which does not appear from the agreed statement of facts, is entitled to every right guaranteed to him by the constitution of Tennessee; but the Supreme Court of that state, which is the sole arbiter in construing its constitution, has determined that none of his rights under that constitution have been infringed.

Forsyth vs. Hammond, 166 U. S., 518, 519.

(2) That the sanctions and obligations of the several treaties between the United States and other nations are binding upon Tennessee, because, as public laws, they are binding upon all the people of this Union.

(3) The State of Tennessee not only recognizes, but insists that the waters of the Mississippi River shall be free to the commerce of every citizen of these United States and that navigation thereon shall be free and unobstructed.

But we submit that there is a well marked distinction between the use of the waters of a river for the purposes of commerce and navigation and the sale of liquor by retail on a steam boat engaged in carrying freight and passengers from one side of such river to the other. The waters of the Mississippi River are free to the steam boat and no impost can be or is sought to be placed thereon, or on its right to receive and discharge passengers and freight; however, it is insisted, that, whenever such steamboat enters the territorial limits of the state, both the steam boat and those thereon become subject to the police power of the state, which was not granted to the general government, but reserved for the benefit, well being and happiness of the citizens of the state.

It is admitted, and if not admitted, well settled, that when the territory now constituting the State of Tennessee was ceded by the State of North Carolina to the United States, the center of the main channel of the Mississippi River was the boundary line separating North Carolina from the then Spanish territory west of that river, and the western boundary of the State of Tennessee is now the middle thread of the main channel of said river.

Moss vs. Gibbs (Tenn.) 10 Heisk., 283.
Stockley vs. Cissna (C. C. A.), 119 Fed. Rep., 812.
Missouri vs. Kentucky, 11 Wall., 395.

Therefore the territory of Tennessee, extending to the middle line of the Mississippi River, it follows, upon well settled principles, that the jurisdiction of the state and its legislative power extend to the limits of its western border line and cover the eastern half of the Mississippi River, subject alone to the rights of the citizens of the United States to the use of the waters of said river for the purpose of transporting and carrying on their commerce. In other words, the jurisdiction and legislative powers of the state are co-extensive with its territory.

U. S. vs. Bevans, 3 Wheat., 386, 387.
Rhode Island vs. Mass., 12 Pet., 733.

In the Bevans case it was determined that the jurisdiction of the state to enforce its criminal laws extends to the territorial limits of the state, including crimes committed upon navigable waters within its territorial limits.

In Smith vs. Maryland, 18 Howard, 76, it was held that a state may regulate fishing in the soil below low water mark.

In Manchester vs. Mass., 139 U. S., 261, 264, it was held that a state may protect fish in a bay within its borders.

Hence we insist that every foot of territory, whether it be out of water or under it, within the borders of the State of Ten-

nessee, is within the jurisdiction of the state and that all persons within her borders are subject to her laws.

It will be noted that the license fee or tax imposed upon the plaintiff in error is not for the use of the water of the Mississippi River, but is a charge for carrying on a business not necessarily incident to the use of the waters of said river.

It is to be noted further that the fee or tax in question is not sought to be imposed either upon the Packet Company or the steam boat, and in so far as this record discloses, the right of said Packet Company to use the waters of said river free from any charge, tax or impost is unquestioned.

But we submit that the plaintiff in error, when within the territorial limits of the state, and engaged in selling liquors at retail on said steam boat when in transit, or especially, when said boat is moored at its landing or wharf at Memphis, to all persons who may apply to make purchases, is not exercising any privilege or immunity guaranteed to him by the Constitution of the United States or any treaty whatsoever. Nor is he entitled to be protected in the exercise of such business upon the theory that he is engaged in navigating the Mississippi River. His acts are nothing more nor less than those of any other retailer of liquors. Whether his place of business be upon the banks above the waters or upon a ferry boat tied to the shore, he is engaged in the retail liquor business and not in navigating the waters of the Mississippi River, in the sense in which that term is used either in the Ordinance of 1787 or any treaty of the United States.

The contentions made on behalf of the plaintiff in error assume that he is a citizen of Tennessee, a citizen of the United States, and a resident of the Mississippi Valley, but we respectfully submit that there is nothing in the agreed statement of facts showing the citizenship or residency of plaintiff in error, and if these matters be material to his contention, he must fail

for the lack of any affirmative showing in regard thereto; bu we do not desire to rest our contention upon this narrow ground

We insist further:

(a) The license fee or tax is not sought to be impose upon the Packet Company, either for carrying on the busines for which it was chartered, or for carrying freight or passen gers, or upon its right to transport liquors on its ferry boats an bring them into the State of Tennessee.

(b) But we do insist that when either the Packet Com pany or its lessee Foppiano brings liquors into the State o Tennessee and offer them for sale, *eo instanti*, (Emert vs. Mis souri, 156 U. S., 320) both the liquors and the act of selling them become subject to the operation of the laws of Tennessee The right to sell intoxicating liquor is not a privilege of United States citizenship under the "privileges and immunities" clause of the 14th amendment of the Constitution of the United States.

Bartemeyer vs. Iowa, 18 Wall., 133.
Giozza vs. Tiernan, 148 U. S., 661.

The regulation of the liquor traffic is peculiarly within the police power of the states. The courts have wisely refrained from prescribing limits to the exercise of the police power of the states. That power embraces all such legislation as will preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society; and it extends over a wide range of subjects; the public health, the public morals and the public welfare, under any one of which the regulation and restriction of the sale of intoxicating liquors would readily fall.

Theilan vs. Porter (Tenn.), 14 Lea, 626.
Webster vs. State, 110 Tenn., 491, 504-5.
Bartemeyer vs. Iowa, 18 Wall, 133.
Mugler vs. Kansas, 123 U. S., 623.

Gloxsa vs. Tiernan, 148 U. S., 661.
Boston Beer Co. vs. Mass., 97 U. S., 25.
Eilenbacker vs. Plymouth Co., 134 U. S., 31.

It is not only the right, but the bounden and solemn duty of a state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends where the power over the particular subject or the manner of its exercise is not surrendered to, or restrained by the constitution of, the United States, and all those powers which relate to merely municipal legislation, or which may more properly be called internal and police, are not surrendered to the general government, and consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.

U. S. vs. DeWitt, 9 Wall, 41.
New York vs. Miln, 11 Pet., 101, 133.

And in the exercise of its police power and for the happiness and conservation of the morals of its citizens, the State of Tennessee has placed an absolute ban upon the sale of liquors in those places comprising nearly three-fourths of its whole territory. It absolutely prohibits the sale of liquor within four miles of any soldiers' home or school house in the state, except such as are within the limits of incorporated towns having a population of more than five thousand. The result of this is that liquors can not be lawfully sold in Tennessee except within eight of its larger towns.

A few years ago there came to the notice of the law-makers the fact that liquors were being sold upon the waters in the state flowing upon territory belonging to the state, and having nearly a thousand miles of navigable waters entirely within the state and her western border being covered by half of the waters of the Mississippi River, upon which front five counties, it was

deemed necessary to the protection of her citizens, for the State to declare that sales of liquor upon any kind of boat or water craft should be subjected to police surveillance, and to that end it was declared a privilege, for the exercise of which it is necessary to comply with those careful regulations and safeguards which have been thrown around the issuance of a license authorizing the sale of liquors in Tennessee for nearly one hundred years. In order to authorize the issuance of a license to retail liquor, it is provided that the same can only be issued by the clerk of the county court and shall not be granted (1) to persons who are incompetent as witnesses in courts of justice; (2) to any person who has been convicted of violating a former license by keeping a disorderly house or permitting gaming in his house or on his premises; (3) or to any person twice convicted of selling, giving or furnishing liquors to minors or to school children; or, within twelve months after conviction, to any person who has been convicted a single time for selling liquors to minors, etc.

Shannon's Code, Sec. 992.

And it is further provided that such license shall only be issued after the applicant therefor has executed a bond to, in all things, comply with the law and has taken and subscribed an oath not to permit or connive at any gaming upon his premises and not to mix or adulterate the liquors offered by him for sale with any substance whatsoever.

Shannon's Code, Sec. 993-4.

Further, in addition to the provisions of Section 16, of the Acts of 1903, above quoted, it is made a high misdemeanor, punishable both by fine and imprisonment, for any one to sell or aid in selling any intoxicating liquors without a license taken out under the provisions referred to.

Acts of 1899, Ch. 161.

We ask, what reason for the protection of commerce, national in its nature, can be invoked to take the retailing of liquors upon a boat within the jurisdiction of the state outside of the operation of its unquestioned police power?

The Mississippi River is nothing more than a great natural highway, half of it flowing over Tennessee territory—what reason can be advanced why the retailing of liquors upon this part of Tennessee's territory is not subject to Tennessee's laws?

If that part of Tennessee's soil which is covered by this great river were an artificial roadway built or maintained by the general government, and free to all for trade and commerce, could it be contended that plaintiff in error would have the right to travel thereon from point to point, either from outside or inside of the state, and carry on the business of a retail liquor dealer, without subjecting himself to the operation of the laws of the State of Tennessee?

The learned counsel for plaintiff in error quotes again and again as applicable to this great natural highway, that part of the 4th section of the ordinance of 1787, as follows:

> "The navigable waters leading into the Mississippi and St. Lawrence **and the carrying places between the same** shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States and those of any other states that may be admitted into the Confederacy, without any tax, impost or duty therefor."

Can it be contended that the plaintiff in error would have had the right to carry on the business of a retail liquor dealer, selling to all who might apply to him to buy, **upon the carrying places or portages between the rivers named in said ordinance,** without subjecting himself to the operation of the state laws

through and over whose territory such carrying places or portages would pass?

We apprehend that a mere statement of these questions shows the utter fallacy of the argument advanced by the learned counsel for plaintiff in error.

II.

FOPPIANO'S BUSINESS IS NOT PROTECTED BY THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

Thus far we have endeavored to show that the jurisdictional limits of Tennessee extend to the middle thread of the main channel of the Mississippi River and that, up to this line, her power and authority are supreme over all persons and in respect of all matters, save and except only where she has delegated her authority to the general government, and we will now examine into the next contention made on behalf of the plaintiff in error to the effect that his business is protected under the commerce clause of the Federal Constitution.

In discussing this phase of the question, we submit, with all respect for the able and learned counsel for plaintiff in error, that the position of the State of Tennessee on the question at issue is wholly misconceived. Tennessee does not seek to place a tax upon the boats owned by the West Memphis Ferry Company, nor upon the capital stock of said company, nor upon the right of said company to transport freight and passengers across the Mississippi River, or for disembarking her passengers or discharging the cargoes of freight from its steam boats. We concede that an attempt to do either of these things might be construed to be a burden upon interstate commerce and therefore beyond the power of the state to enforce. But can it be contended that retailing liquors on a steamboat not only

while it is in transit, but moored at its landing in Tennessee, is commerce between the states, even though the boat upon which the sales were made is engaged in transporting freight and passengers from one side of this great natural highway to the other?

As noted by the Supreme Court of Tennessee in its opinion (Rec., p. 61) the agreed statement of facts fails to show that the charter of the Packet Company conferred any authority to sell liquors at retail or to lease the privilege of doing so to another; in fact, the charter issued by the State of Arkansas to the Packet Company only authorizes it to buy or build and own steam boats and other water craft to be used in transporting freight and passengers on the Mississippi River and other navigable streams connecting therewith, within the limits of the State of Arkansas.

Record, pp. 2, 10.

Further it is material to be noted, in addition to the utter absence of express corporate authority, there is nothing in the agreed statement of facts to show whether the liquors and beer retailed by the plaintiff in error at his bar were brought into Tennessee from the State of Arkansas or any other foreign state. As found by the Supreme Court of Tennessee: "**For all that appears in the record, the intoxicants kept and sold at this bar may have been purchased in Tennessee * * * for retail at the port of Memphis within this state.**"

Record, p. 61.

We submit that the facts in regard to the method and manner of sale set out in the agreed statement, as well as the utter failure of plaintiff in error to show not only from whence he came—because it does not appear whether he is a citizen of Tennessee or any of the United States—or that he brought his liquors and beer from some other state into Tennessee, effectu-

ally preclude him from insisting that, in dispensing liquor at his bar, while within the territory of Tennessee, he was engaged in interstate commerce.

The onus, both as to citizenship and that the liquors sold by him were being imported, or in course of importation, was upon plaintiff in error. The judgment of the court below could have been rested alone on this point, which was conclusive of the case. It is well settled that this court will not look to the Federal question involved in a decision of a state court, if there is another independent ground upon which such decision can rest.

Bacon vs. Texas, 163 U. S., 207.
O'Neil v. Vermont, 144 U. S. 323.

But, without regard to this last point, we insist that the license fee or tax should be sustained upon broader grounds, that is, the inherent right of the state to tax everything within its borders, save only when the exercise of such power would encroach upon the authority of the general government under powers delegated to or vested in it by the states.

As said by Chief Justice Marshall in McCullough vs. Maryland, 4 Wheat, 429, all subjects over which the sovereign power of the state extends are objects of taxation, and it is only matters exclusively national in their character which the state may not touch.

In the case of Gibben vs. Ogden (9 Wheat., 195), it is said:

> "The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal concerns of a state may then be considered as reserved for the state itself."

We have been wholly unable to find any reported case where it has even been contended that the sale of liquors at retail, within the territorial limits of a state, is interstate commerce, and within the protection of the Federal Constitution. And we do not believe there is anything to be found in the many opinions rendered by this honorable court in cases involving the liquor traffic, which would justify the claim that sales at retail are under the protection of the Federal government. As said by the Supreme Court of Tennessee, the long line of cases found in the reports of the Supreme Court of the United States, agree in confirming the general proposition that the regulation of the manufacture and sale of intoxicating liquors is peculiarly under the control of the states and within their police power, which has not been surrendered to the Federal government.

Mugler vs. Kansas, 123 U. S., 623.
Bartemeyer vs. Iowa, 18 Wall, 125.
Boston Beer Co. vs. Mass., 97 U. S., 25.
Foster vs. Kansas, 112 U. S., 201.
Kidd vs. Pearson, 128 U. S., 1.

In the earlier cases (5 How., 504) it was practically determined that the authority of the state over the liquor traffic was without limit, but subsequently such views prevailed upon this question that liquors were not only permitted to be imported into a state, but sold in "original packages."

Bowman Case, 125 U. S., 465.
Leisy's Case, 135 U. S., 100.

But this court, we respectfully submit, has never gone to the extent of holding that, even if liquors were imported into a state and the original packages of import broken and the liquors exposed for sale, that such sales are under the protection of the Federal government. It is often most difficult to mark the

point where the goods sold cease to be a subject of interstate commerce and fall within the domain of domestic trade or commerce. But we submit that it is now well settled that where goods are imported into a state and become intermingled with the general mass of property therein and exposed for sale, that such goods are no longer to be considered the subjects or objects of interstate commerce.

Emert vs. Missouri, 156 U. S., 296.
May vs. New Orleans, 178 U. S., 496.

However, without further entering into a discussion of principles governing other classes of property which may become the subjects of commerce between the states, it is to be noted that, as said by the Supreme Court of Tennessee:

> "The Bowman and Leisy cases attracted great attention and produced a feeling of discontent among those who believed the liquor traffic in all of its forms should be under the supervision of the various states. This conviction was so wide-spread and such pressure was brought to bear upon Congress, that in 1890, it passed an act popularly known as the Wilson Bill, (26 Stat., 313, Ch. 728) which provided:
>
> 'That all fermented, distilled or intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subjected to the operation and effect of the laws of such state or territory, enacted in the exercise of its police power, to the same extent and in the same manner as though such liquids or liquors has been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.' "

Rec., pp. 62, 63.
Harrell vs. Speed, 113 Tenn., 233.

The effect of this Act of Congress was to remove all impediments to the enforcement of the state laws in respect of the sale and taxation of intoxicating liquors, even when such liquors were imported in original packages, and withdrew from the protection of the commerce clause of the Federal Constitution persons and corporations bringing liquor into a state for the purpose of sale without regard to the condition or means by which such liquors were held or sold.

In re Rahrer, 140 U. S., 545.

Vance vs. Vandercook Co., (1) 170 U. S., 446.

Rhodes vs. Iowa, 170 U. S., 412.

But it is contended in the brief of counsel for plaintiff in error that the Wilson Act was never intended to interfere with intoxicating liquors while they were the subjects of interstate commerce, and that its operation was confined to liquors or liquids imported into the state after they had become intermingled with the mass of taxable property in such state, and, wonderful to say, the cases last above cited were relied upon to sustain this contention.

The Supreme Court of Tennessee effectually disposes of this argument as follows:

> "To this contention it may be replied, that, if this were its only effect, then it was idle legislation. For it was never a matter of doubt as to the absolute right of the state to control by taxation or otherwise either intoxicants or any other character of property within the state."
>
> **Record, p. 63.**

Therefore we insist that, even if it be conceded that the liquors sold and dispensed by Foppiano over his bar on a steam boat either while it was in transit or fast at its wharf in Mem-

phis, were within the operation of the laws of Tennessee and subject both to its police and taxing power.

But it is further contended that, because these liquors were retailed upon a boat engaged in interstate commerce, that therefore the retailing itself was interstate commerce. We apprehend that this position is predicated upon the mistaken assumption that whatever may be connected, even remotely, with an agency engaged in commerce between states is protected by the Federal Constitution. This court has repeatedly held that many agencies employed in interstate commerce are subject to the proper police power of the state. It has been held that a state statute prohibiting the running of trains within the state on Sunday is not void as an interference with interstate commerce, though in effect it prevents trains from passing through the state on Sunday from and to adjacent states, but is a valid exercise of the police power.

Hennington vs. Georgia, 163 U. S., 299.

So, a statute requiring railroads engaged in interstate and other commerce to stop their trains each way daily, Sundays excepted, have been upheld as a reasonable and valid police regulation.

Lake Shore, &c., Ry. Co. vs. Ohio, 173 U. S., 285.

So a state may require engineers and other persons engaged in the driving and management of railroad trains passing through the state to submit to an examination by a local board as to their fitness for their positions.

Smith vs. Alabama, 124 U. S., 465.
Richmond, etc., R. R. Co. vs. Patterson, 169 U. S., 311.
Mo., etc., R. R. Co. vs. Haber, 169 U. S., 633.
Nashville, etc., R. R. Co. vs. Alabama, 128 U. S., 96.

So a state may require, under penalties, the heating of passenger cars engaged in interstate commerce.

New York, etc. R. R. Co. vs. N. Y., 165 U. S., 628.

A regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains, an unconstitutional regulation of interstate commerce.

Erb vs. Morasch, 177 U. S., 584.

So it is entirely within the power of a state to provide separate coaches for the accommodation of the white and colored races.

L. & N. R. R. Co. vs. Miss., 136 U. S., 589.
Plessy vs. Ferguson, 163 U. S., 537.
Smith vs. State, 100 Tenn., 494.

In Pittsburgh, etc., Coal Co. vs. La., 156 U. S., 590, 600, it was held that a state had power to provide for the appointment of one or more gaugers of coal and coke boats, transporting coal from Pittsburgh over the waters of the Mississippi River to New Orleans and that such regulations was not in conflict with the commerce clause of the Federal Constitution.

In this last case Mr. Justice Field quoted with approval Sherlock vs. Alling, 93 U. S., 99, as follows:

> "But, upon examination of the cases, * * * it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce or exacted a license from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all cases the legislation attempted operated **directly** upon commerce, either by way of a tax upon the business, license for its pursuit in particular channels, or conditions for carrying it on.

*** * * In conferring upon congress the regulation of commerce, it was never intended to cut the state off from legislating on all subjects relating to the health, life and safety of her citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce, and persons engaged in it, without constituting a regulation of it within the meaning of the constitution. * * * And it may be said generally, that legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."**

SOME DECISIONS OF STATE COURTS OTHER THAN TENNESSEE.

When it is considered that it is almost a universal custom to sell liquors upon Pullman Palace cars, dining cars and steam boats engaged in interstate commerce, it is perhaps surprising that the precise question before this court has not been more generally determined by state courts than seems to be the case from an examination of the question.

In State vs. Frappart, 31 La. Ann., 340, the doctrine contended for on behalf of plaintiff in error was recognized. But, as we have hereinbefore endeavored to show, the rule applied in that case is unsound and the facts therein involved do not constitute commerce between the states.

As opposed to the Frappart case, we call the attention of your honors to another decision of the Supreme Court of Louisiana, wherein it was held that a city tax imposed on an exhibition company on board a vessel engaged in interstate commerce is a valid police regulation.

Board of Selectmen vs. Spalding, 8 La. Ann., 87.

We can see no difference in principle between the sale of liquors on board a steam boat engaged in interstate commerce and an exhibition for pleasure thereon, and certainly it would seem that there were graver reasons why the liquor traffic on such steam boat should be regulated than a mere exhibition for pleasure had thereon.

Plaintiff in error is engaged in a strenuous endeavor to protect his right to sell liquors upon a steam boat which he claims is "Arkansas soil," wherever it may be, yet the State of Arkansas forbids and punishes sales of liquors without license on boats upon the Mississippi River between the middle line thereof and the Arkansas shore.

Cessill vs. State, 40 Ark., 501-2.

It is true that the boat in the Cessill case from which the sales were made was permanently anchored in the Mississippi River, but we insist the same reasons for placing the liquor traffic upon such a boat under police regulations apply, and with equal force, to traffic upon a boat crossing and re-crossing the river and making sales when anchored or tied to its wharf or landing place.

In the case of State vs. Blands, 101 Mo. App., 618 (74 S. W., 3), it was held that a person selling intoxicating liquors from a steam boat at a landing on the Missouri side of the Mississippi River without license from the State of Missouri, violated the laws of that state, notwithstanding such liquors were sold from a steam boat engaged in interstate business and owned by a firm or partnership residing in Memphis, Tenn., where a tax had been paid to the County of Shelby and State of Tennessee. In that case the court said the commission of the offense was completely established, and the fact that it was perpetrated upon a steam boat at Tyler, Peimscott County, does not legalize or condone the offense, nor is it affected by compliance by defendant's employers with the Federal and state laws

governing the liquor traffic at the home port in a state other than Missouri.

In the case of La Norris vs. State, 13 Texas App., 33-42, was involved the same principle which, we insist, governs in the determination of this case.

In that case La Norris, a Pullman Palace Car conductor, was indicted for unlawfully selling liquors in Wood County, Texas, without first paying the tax therefor. The car from which the liquors were sold was used in interstate commerce and the sale upon which the indictment was predicated was made in Wood County, Texas. Article 10 of the Penal Code of Texas provides as follows:

> "Any person who shall pursue or follow any business, calling or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes so due, and not more than double that sum."

La Norris was indicted and convicted for a violation of the provision above quoted and insisted that a sale from one on the Pullman cars while in transit was not a violation of law.

Said the Texas court, speaking through Wilson, J.:

> "We think it is clearly within the letter of the law, and we can see no good reason why we should not hold it to be within the spirit and intent of the law.
>
> "The law is operating through the limits of the state, and operates upon all alike. It makes no distinction between persons, whether they be traveling or stationary, whether they be the owners or conductors of a Palace car, or the drivers of a hack or other vehicle. Whenever one of these Palace cars crosses the line into this state, it is within the jurisdiction of the laws of this state, and all persons who are transported by it are subject to those laws, and as much bound to obey them as any citizen of the state. We could elab-

orate our views upon this question and advance many cogent reasons for holding as we do, but we think it sufficient for us to say that neither the letter nor the spirit of the law exempts the Pullman Palace Car Company, or any other corporation or person, from its operation,—and that it is as much a violation of law to engage in the business of retailing spirituous liquors, without paying the occupation tax, upon a car traveling over a railroad, as it is to carry on that business in the usual mode."

"We can see no sort of difference between a sale made from a Pullman car engaged in interstate commerce and a sale made from a steam boat, while within the jurisdiction of Tennessee, although it is engaged in plying the water of a navigable river between this and another state.

III.

NO ESTOPPEL UPON THE STATE.

It is next insisted that, in any event, Tennessee is estopped to exercise the power vested in her to regulate and control the liquor traffic upon that part of the Mississippi River within her territory, because: (1) For a long number of years she did not attempt to exercise any authority over the liquor traffic upon said river. (2) That under the express provision of Sec. 16, of Ch. 257, of the Acts of 1903, the state declared that the taxes upon privileges imposed by said Act, "shall not apply to any person, firm or corporation engaged in interstate commerce."

Acts of 1903, Ch. 257, Sec. 16, pp. 629, 630.

In answer to the first proposition, we do not deem it necessary to say more than that it is entirely within the power of the state, not only to select the objects upon which its police power shall be exercised, but also to choose both the method and the manner of putting its laws into execution.

In answer to the construction which is sought to be placed upon the concluding clause of Sec. 16, of the Act of 1903, quoted above, we submit that, to bring the provision of said clause into operation, it must be assumed that plaintiff in error was engaged in interstate commerce. As shown above, such contention can not be maintained. And, in any event, the provision quoted added nothing whatever to the force of the statute and was merely a declaration by the legislature that it was not intended to tax commerce between the states. In no event could the state have taxed such commerce and said provision added nothing whatever to the statute. Such, in effect, was the construction placed by the Supreme Court of Tennessee upon the provision in question and we apprehend that this court will follow the construction placed upon said statute by the court of last resort of that state.

First Nat. Bank vs. Chehalis County, 116 U. S., 440.

ACT OF 1903 NOT IN CONFLICT WITH CONSTITUTION OF TENNESSEE.

This rule, that the Supreme Court of a state is the supreme and final arbiter of the construction to be placed upon one of its own statutes, applies also to the contention found in the brief (pp. 119, 120) that the Act of 1903, under consideration, is violative of the following provision of the constitution of Tennessee: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

Leeper vs. Texas, 139 U. S., 462.
Nobles vs. Georgia, 168 U. S., 398.
Bergman vs. Baecker, 157 U. S., 655.
Brown vs. New Jersey, 175 U. S., 172.

If the Supreme Court of Tennessee had been of the opinion that the Act of 1903 was in contravention of the Constitution of Tennessee, the judgment of that court would have been for plaintiff in error.

In Leeper vs. Texas, 139 U. S., 462 (35-225), we quote from syllabus:

> "Whether statutes of a state have been duly enacted in accordance with the requirements of the constitution of such state is not a Federal question and the decision of state courts as to what are the laws of the state is binding upon the courts of the United States. * * *
>
> "The validity of the enactment of the Texas Codes is not open to inquiry in this court."

Again in Nobles vs. Georgia, 168 U. S., 399 (42-515), the court said:

> "A construction of state statutes by the court of last resort of the state will be followed by this court."

In the case of Bergman vs. Baecker, 157 U. S., 655 (39-848), was before the court on a motion for writ of habeas corpus, this court, after quoting many state court decisions, said:

> "In view of these decisions (state court) declaring the meaning and scope of the statutes under which the accused was prosecuted, it can not be held that he was proceeded against under an indictment based upon statutes denying to him the equal protection of the laws, or that were inconsistent with due process of law, as prescribed by the 14th amendment of the Constitution of the United States."

In the case of Fielden vs. State of Illinois, 143 U. S., 452, (36-226), in which plaintiff in error contended because the Supreme Court of Illinois permitted the amendment of a record in his case at a time when he was not present, either in person or by counsel, that he was convicted without due process of law. This Court held that such action was not a denial of the equal protection of the law, and that it was in conformity with due process of law, and said:

> "We take, as is our duty, the laws of Illinois to be as declared by its highest court." * * *

In the case of Brown vs. State of New Jersey, 175 U. S., 172 (44-119), the court said:

> "The decision of the highest court of a state, that a statute is not in conflict with the constitution of the state, is conclusive on Federal courts."

Further, the Tennessee cases cited on the brief did not involve acts of the General Assembly similar to the one under consideration by your honors, and moreover, the Act of 1901, almost identical in its provisions with the Act of 1903, has been adjudged sound and valid under a similar attack, predicated upon this precise constitutional provision.

Carroll vs. Alsup, 103 Tenn., 257.

THE JUDGMENT OF SUPREME COURT OF TENNESSEE SHOULD BE AFFIRMED.

Therefore, in conclusion, we respectfully submit to this honorable court that the judgment of the Supreme Court of Tennessee should be affirmed, because:

(1) The western boundary of Tennessee is the middle line of the main channel of the Mississippi River and to such line the jurisdiction of Tennessee extends.

(2) The selling of liquors at retail on a steam boat within the jurisdictional limits of Tennessee is not in itself interstate commerce, even though said steam boat may be engaged in commerce between the states.

(3) That plaintiff in error, having been engaged in selling at retail intoxicating liquors on a steam boat within the jurisdictional limits of Tennessee, was liable for the license fee or tax imposed by the laws of that state.

Respectfully submitted,

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